TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1905.

No. ~~230~~ 14.

REUBEN HODGES, WILLIAM R. CLAMPIT, AND WASH McKINNEY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED APRIL 22, 1904.

(19,305.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 3, 1904.

1 UNITED STATES OF AMERICA:

To the honorable judge of the district court of the United States for the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States of America, plaintiff, and Reuben Hodges, William R. Clampit and Wash McKinney, defendants, a manifest error has happened, to the great prejudice and damage of the said defendants, Reuben Hodges, William R. Clampit and Wash McKinney, as is said and appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, in the city of Washington, District of Columbia, together with this writ, so as to have the same at the said place in said court on the 20th day of April, 1904, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Jacob Trieber, judge of the district court of the United States for the eastern district of Arkansas, this 21st day of March, 1904.

Attest my hand and seal of the United States dissrict court, for the eastern division of the eastern district of Arkansas, at the clerk's office at Helena, Arkansas, on the day and year last above written.

[Seal of the United States Court, Eastern District Arkansas, Helena.]

EMERSON R. CRUM,
Clerk United States District Court for the Eastern Division, Eastern District of Arkansas.

Allowed by
JACOB TRIEBER,
District Judge.

Service acknowledged this March 21st, 1904.
WM. G. WHIPPLE,
United States Attorney, Eastern District of Arkansas.

1½ [Endorsed:] No. 279. United States *vs.* William R. Clampit, Rabe Hodge and Wash McKinney. United States district court, eastern division, eastern district of Arkansas. Writ of error. Filed April 6th, 1904. —— ——, clerk.

1—230

Return to Writ.

UNITED STATES OF AMERICA,
Eastern Division, Eastern District of Arkansas.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said district court, at office in the city of Helena, this 6th day of April, A. D. 1904.

[Seal of the United States Court, Eastern District Arkansas, Helena.]

EMERSON R. CRUM, *Clerk.*

2 UNITED STATES OF AMERICA,
Eastern Division, Eastern District of Arkansas.

Be it remembered, that at a regular term of the district court of the United States, in and for the eastern division of the eastern district of Arkansas, begun and holden in the United States court rooms, in the city of Helena, on the 5th day of October, A. D. 1903, the same being the first Monday in said month, there was present and presiding, Honorable Jacob Trieber, U. S. district judge; Wm. G. Whipple, Esq., U. S. district attorney; A. S. Fowler, Esq., U. S. marshal, and Emerson R. Cram, clerk of said court, whereupon, among others, the following proceedings were had on the 6th day of October, A. D. 1903, viz:

Empaneling of Grand Jury.

Now on this day the venire for the grand jury at the present term, in pursuance of law and the rules of this court, is returned into court by the marshal, whereupon the said jurors were called, to-wit: Jesse L. Kendall, W. H. Autry, M. Collins, W. L. Segers, Charles Wooten, W. W. Harrison, John Dover, J. J. Barron, John Dudgeon, I. Block, G. P. A. Brown, H. L. Puryear, Wm. E. Lloyd, C. P. Norman, H. P. Grant, John Barrow, Leon Moore, James Fussell, Wilbur Thompson, W. B. Galloway, R. C. Wilson, J. E. Jones, Lewis Spence, M. B. Harvey, S. A. Brownlee, James Bassett, and Charles Sanders, and thereupon M. Collins, Charles Wooten, W. W. Harrison, Leon Moore, James Fussell, and Charles Sanders are upon their several applications, and for legal and sufficient reasons,
3 excused from serving as such grand jurors, and thereupon J. E. Jones, Jesse L. Kendall, W. H. Autry, W. L. Segers, John Dover, J. J. Barron, John Dudgeon, I. Block, G. P. A. Brown, H. L.

Puryear, Wm. E. Lloyd, C. P. Norman, H. P. Grant, John Barrow, Wilbur Thompson, W. B. Galloway, R. C. Wilson, Lewis Spence, M. B. Harvey, S. A. Brownlee, and James Bassett, twenty-one (21) in number, were duly tried, accepted, and by order of the court J. E. Jones is appointed foreman of the grand jury, and thereupon said foreman and his fellows are duly empanelled, sworn and charged by the court as the grand inquest of the United States for the eastern division of the eastern district of Arkansas, and retired to consider of their action.

Fourth day of October term, 1903.

THURSDAY, *October* 8, 1903.

Present, presiding and holding said court, Honorable Jacob Trieber, U. S. district judge, and other officers as noted on the 5th day of October last past.

Report of Grand Jury.

On this day came the grand jury, and having answered to their names, through their foreman, returned into court nine true bills of indictment, which were filed in open court and in the presence of the grand jury, and are numbered 279 to 287, both inclusive, and thereupon the grand jury retired to consider further of its action.

4 *Indictment.*

In the District Court of the United States for the Eastern District of Arkansas and the Eastern Division Thereof, October Term, 1903.

The grand jurors of the United States, chosen, selected and sworn, in and for said district and division, upon their oaths do find and present that W. W. Maples, J. R. Parker and S. L. Rorax, whose Christian names are to these grand jurors unknown, and Rube Hodge, William R. Clampit, John H. Harrison, Lee Bridges, Charles Blake, Clyde Stafford, Will Stafford, Will England, Tom Gozelle, John Parker, Rube Parker, and Wash McKinney, late of said district and division, did heretofore, to wit: on the 17th day of August, A. D. 1903, in the county of Poinsett in said district and division and within the jurisdiction of this court, knowingly, wilfully and unlawfully conspire, to oppress, threaten and intimidate Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, citizens of the United States of African descent, in the free exercise and enjoyment of rights and privileges secured to them and each of them by the Con-

stitution and laws of the United States and because of their having exercised the same, to-wit: the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, being then and there persons of African descent and citizens of the United States and of the State of Arkansas, had then and there made and entered into contracts and agreements with James A. Davis and James S. Hodges, persons then and there doing business under the name of Davis & Hodges as co-partners, carrying on the business of manufacturers of lumber at White Hall, in said county, the said contracts being for the employment by said firm of the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton,
5 Jim Hall and George Shelton as laborers and workmen in and about their said manufacturing establishment, by which contracts the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton were on their part to perform labor and services at said manufactory and were to receive on the other hand for their labor and services compensation, the same being a right and privilege conferred upon them by the thirteenth amendment to the Constitution of the United States and the laws passed in pursuance thereof and being a right similar to that enjoyed in said State by the white citizens thereof, and while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton were in the enjoyment of said right and privilege the said defendants did knowingly, willfully and unlawfully conspire as aforesaid to injure, oppress, threaten and intimidate them in the free exercise and enjoyment of said right and privilege and because of their having so exercised the same and because they were citizens of African descent enjoying said right, by then and there notifying the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton that they must abandon said contracts and their said work at said mill and cease to perform any further labor thereat, or receive any further compensation for said labor, and by threatening in case they did not so abandon said work to injure them, and by thereafter then and there wilfully and unlawfully marching and moving in a body to and against the place of business of the said firm while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton were engaged thereat and while they were in the performance of said contracts thereon the said defendants being then and there armed with deadly weapons, threatening and intim-
6 idating the said workmen there employed, with the purpose of compelling them by violence and threats and otherwise to remove from said place of business, to stop said work and to cease the enjoyment of said right and privilege, and by then and there wilfully, deliberately and unlawfully compelling said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton to quit said work and abandon said

place and cease the free enjoyment of all advantages under said contracts, the same being so done by said defendants and each of them for the purpose of driving the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton from said place of business and from their labor because they were colored men and citizens of African descent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

WM. G. WHIPPLE,
United States Attorney, Eastern District of Arkansas.

Endorsed: No. 279. District court United States. The United States *vs.* W. W. Maples, J. R. Parker, S. L. Rorax, Rube Hodge, Wm. R. Clampit, John H. Harrison, Lee Bridges, Charles Blake, Clyde Stafford, Will Stafford, Will England, Tom Gozelle, John Parker, Rube Parker and Wash McKinney. Indictment. Section 5508 and 1977. A true bill. J. E. Jones, foreman. Wm. G. Whipple, U. S. attorney. Filed Oct. 8, 1903. Emerson R. Crum, clerk.

7 Fourth day, October 8th, 1903.

UNITED STATES *vs.* W. W. MAPLES, J. R. PARKER, S. L. RORAX, RUBE HODGE, Wm. R. Clampit, John H. Harrison, Lee Bridges, Charles Blake, Clyde Stafford, Will Stafford, Will England, Tom Gozelle, John Parker, Rube Parker, and Wash McKinney.	279.

On this day come the defendants, by their attorney, L. C. Going, Esq., and file their demurrer to the indictment herein.

Demurrer to Indictment.

In the District Court of the United States, Eastern Division, Eastern District of Arkansas.

UNITED STATES *vs.* W. W. MAPLES, J. R. PARKER, S. L. RORAX, RUBE HODGE, Wm. R. Clampit, John R. Harrison, Lee Bridges, Charles Blake, Clyde Stafford, Will Stafford, Will England, Tom Gozelle, John Parker, Rube Parker, and Wash McKinney.	279.

Come the defendants above named in their own proper person, and by their attorney, L. C. Going, and here and now in open court file this, their demurrer to the indictment in this cause, and for cause of demurrer, say:

First. That the allegations, matters and things, set out and charged in said bill of indictment do not constitute a public offense against the laws of the United States.

Second. Said bill of indictment is founded and based upon
8 section 1977 of the Revised Statutes of the United States, being a portion of an act of the Congress of the United States approved on May 31st, 1870, and said section is unconstitutional and void because no warrant or authority is conferred by the Constitution of the United States upon the Congress thereof to enact the same.

Third. Said section, when taken and construed together with section 5508 of the Revised Statutes of the United States in so far as it creates offenses and imposes penalties, is in violation of the Constitution of the United States and an infringement on the rights of the several States and the people thereof.

Fourth. Because the offense created by section- 1977 and 5508 of the Revised Statutes of the United States, under and upon which the indictment herein is based are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only and legislative action thereon is among the rights reserved by the several States and inhibited to Congress by the Constitution.

L. C. GOING,
Att'y for Def'ts.

Wherefore defendants pray that said indictment be quashed, set aside and held for naught and that they be discharged and allowed to go hence without day and for all other proper relief.

L. C. GOING,
Att'y for Def'ts.

Endorsed: No. 279. U. S. district court, east. dist. of Ark., eastern division. United States *vs.* W. W. Maples *et al.* Demurrer. Filed Oct. 8, 1903. Emerson R. Crum, clerk.

9 Fifth day of October term, 1903.

FRIDAY, *October 9th*, 1903.

Present, presiding and holding said court, Honorable Jacob Trieber, U. S. district judge, and other officers as noted on the 5th day of October last past.

UNITED STATES
vs. } 279.
W. W. MAPLES ET AL.

On this day comes the United States, by Wm. G. Whipple, Esq., district attorney, and the defendants in person and by L. C. Going,

Esq., their attorney, and the demurrer heretofore filed was argued by counsel, and the court being fully advised in the premises, doth overrule the same, and on motion of the defendants this cause is continued for the term.

The following opinion was delivered by the court in the case of United States *v.* A. M. Morris, *et al.*, in which the same questions were involved, and which was referred to by the court as the reasons for overruling the demurrer.

10 *Opinion.*

In the District Court of the United States for the Eastern Division of the Eastern District of Arkansas.

UNITED STATES
vs.
A. M. MORRIS ET AL.

On demurrer to the indictment.

TRIEBER, *District Judge:*

The defendants are indicted for a violation of the provisions of section 5508 U. S. Revised Statutes, the specific charge being that they conspired to injure, oppress and intimidate certain citizens of the United States of African descent in the free exercise or enjoyment of certain rights secured to them by the Constitution and laws of the United States on account of their being negroes. The right which it is charged the defendants sought to prevent the persons named in the indictment from exercising on account of their race and color is the right to lease lands and cultivate them, a right alleged to be guaranteed to them by the thirteenth amendment to the Constitution of the United States and the provisions of section 1 of the act of Congress entitled "An act to protect all persons in the United States in their civil rights and furnish means of their vindication" enacted April 9, 1866, 14 Statutes at Large, 27, digested in the U. S. Revised Statutes as section 1978, U. S. Compiled Statutes, p. 1262.

The demurrer challenges the constitutionality of both statutes. The constitutionality of section 5508 is no longer open to controversy, its validity having been determined and upheld by the Su-
11 preme Court in *Ex parte* Yarbrough, 110 U. S. 651; United States *vs.* Waddell, 112 U. S. 76; Baldwin *vs.* Franks, 120 U. S. 678; Logan *vs.* United States, 144 U. S. 291; Motes *vs.* United States, 178 U. S. 458.

The only question therefore, left for determination is the constitutionality of section 1 of the civil rights act, April 9, 1866. Nothing in the Constitution of the United States as originally adopted or

in any of the first twelve amendments to that instrument, adopted shortly after the ratification of the Constitution, would warrant the enactment of this act by Congress. Section 2 of article 4 guaranteeing to citizens of each State all privileges and immunities of citizens in the several States merely secures and protects the right of a citizen of one State of the United States to pass into any other State of the Union for the purpose of engaging in lawful business; to acquire and hold property; to maintain actions in the courts of that State, and to be exempt from taxes and excises not imposed by the State, on its citizens, free from all discriminations, such discriminations being made by the State in its capacity of a sovereign, but does not apply to acts of individuals. Paul *vs.* Virginia, 75 U. S. 168; Ward *vs.* Maryland, 79 U. S. 418; Slaughter-House cases, 83 U. S. 36; Blake *vs.* McClung, 172 U. S. 239.

If the power to enact the legislation involved in this proceeding exists at all it must have been granted by some provisions of the last three amendments to the Constitution, the thirteenth, fourteenth or fifteenth. As the acts contemplated by this statute are those of individuals, as well as of officers in the enforcement of the statutes of a State or in the discharge of official functions, neither the fourteenth nor fifteenth amendments can be relied upon as an authority for it, as it is now well settled that these two amendments have reference solely to actions of the State and not to any action of
12 private individuals, although it is immaterial whether the State acts by its legislative, executive or judicial authority. United States *vs.* Reese, 92 U. S. 214; United States *vs.* Cruikshank, 92 U. S. 542; Virginia *vs.* Rives, 100 U. S. 313; *Ex parte* Virginia, 100 U. S. 339; Civil Rights cases, 109 U. S. 3; United States *vs.* Harris, 106 U. S. 629; James *vs.* Bowman, 190 U. S. 127.

The power of Congress to enact such legislation must, therefore, be found in the thirteenth amendment, else it does not exist. That Congress assumed that its power was derived from that amendment and not from either of the later amendments is conclusively shown by the fact that at the time this law was enacted in 1866 neither the fourteenth nor fifteenth amendments had been ratified, or even submitted by Congress to the States. The fourteenth amendment was submitted for ratification by resolution of June 16, 1866, and declared a part of the Constitution on July 21, 1868, while the resolution to submit the fifteenth amendment to the States was only passed by Congress on February 27th, 1869, and the amendment promulgated as a part of the Constitution on March 30, 1870. The language of the thirteenth amendment differs materially from that used in the two later ones. While the fourteenth amendment provides that "No State shall make or enforce any law which shall abridge," etc., and the fifteenth amendment declares that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account," etc., the thirteenth amendment declares, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly

convicted, shall exist within the United States or any place subject to their jurisdiction." There is no limitation in that amendment confining the prohibition to the States, but it includes everybody within the jurisdiction of the National Government. This
13 distinction in the language of these amendments was fully recognized by the Supreme Court in the Civil Rights cases, 109 U. S. 3. Mr. Justice Bradley, in delivering the opinion of the court, said:

"We must not forget that the province and scope of the 13th and 14th amendments are different; the former simply abolishes slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States, by depriving them of life, liberty or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the 13th amendment, it has only to do with slavery and its incidents. Under the 14th amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect of abridging any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the 13th amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, *may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not;* under the 14th, as we have already shown, it must necessarily be and can only be corrective in its character, addressed to counteract and afford relief against State regulations or proceedings." 109 U. S. 23.

Congress is therefore, authorized by the provisions of the thirteenth amendment to legislate against acts of individuals, as well as of the States, in all matters necessary for the protection of the rights granted by that amendment.

Slavery being prohibited within any place subject to the jurisdiction of the United States and Congress being authorized by the second section of the amendment "to enforce this article by appropriate legislation," does that vest it with the power to protect those emancipated from slavery by this constitutional amendment, in the enjoyment of such rights as it is charged in the indictment the defendants conspired to deprive them of, or is that power still solely reserved to the States, notwithstanding the adoption of this amendment?

The powers of Congress are limited to such matters as are expressly or by implication granted to it by the National Constitution,
14 it being an enabling instrument, while the constitutions of the States are limitations upon the power of the legislatures of the respective States. There can be no doubt that the same power may exist at the same time in the nation as well as the States. Gib-

bons *vs.* Ogden, 22 U. S. 1, 235; Passenger cases, 48 U. S. 540, 553, 561; M. K. & T. Ry. Co. *vs.* Haber, 169 U. S. 613, 627. The same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. Fox *vs.* Ohio, 46 U. S. 410, 433; Moore *vs.* Illinois, 55 U. S. 13, 19; United States *vs.* Cruikshank, 92 U. S. 542, 550; *Ex parte* Siebold, 100 U. S. 371, 390; Cross *vs.* North Carolina, 132 U. S. 131, 139. The citizens of the United States resident within any State are subject to two governments; one State and the other National. Every citizen owes allegiance to both of these governments, and within their respective spheres must be obedient to the laws of each. In return he is entitled to demand protection from each within its own jurisdiction. The thirteenth amendment is a great extension of the powers of the National Government. In the language of Mr. Justice Swayne, in United States *vs.* Rhodes, 1 Abb. (U. S.) 28, 37:

"It trenches directly upon the powers of the States and of the people of the States. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the States where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions and a conflict of interests, real or imaginary, as old as the Constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil and with it forever the power to restore it. Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction."

The effect of this amendment on the negro, as stated by the same learned jurist in that case, is:

"That the emancipation of a native born slave by removing the disability of slavery made him a citizen without any further act of Congress."

"Citizens under our Constitution and laws means free inhabitants born within the United States or naturalized under the laws of Congress." 1 Kent Conn. 292, and the possession of political rights is not essential to citizenship. Minor *vs.* Happersett 88 U. S. 162. 6 Am. & Engl. Encycl. of Law 15.

Every citizen and freeman is endowed with certain rights and privileges, to enjoy which no written law or statute is required. These are fundamental or natural rights, recognized among all free

people. In our Declaration of Independence, the Magna Charta of our republican institutions, it is declared:

"We hold these rights to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to affect their safety and happiness."

Nor were the framers of the constitution of this State less emphatic in the expression of their views on this subject, for in the bill of rights of the State of Arkansas it is provided:

"All men are created equal free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."

16 Can there be any doubt that the right to purchase, lease and cultivate lands, or to perform honest labor for wages with which to support himself and family, is among these rights thus declared to be "inherent and inalienable?" In Corfield *vs.* Coryell, 4 Wash. (C. C.) 371, decided as early as 1823, Mr. Justice Washington said:

"What these fundamental rights are would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads;"

and thereupon he enumerated among others "To take, hold and dispose of property, either real or personal." While this opinion was delivered by the learned justice in a cause heard by him on the circuit, it has received the approval of the Supreme Court of the United States in numerous cases. Slaughter House cases, 83 U. S. 36, 75, 97; Butchers' Union Co. *vs.* Crescent City Co., 111 U. S. 746, 762, 764; Blake *vs.* McClung, 172 U. S. 239, 248. In Butchers' Union Co. *vs.* Crescent City Co. *supra*, on page 762, Mr. Justice Bradley in a concurring opinion says:

"The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

Again, on page 764, he proceeds:

"I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."

And again on page 765:

"But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which as already intimated, is a material part of the liberty of the citizen."

17 These extracts were cited with approval and reaffirmed by the Supreme Court in Allgeyer *vs.* Louisiana, 165 U. S. 578, 589. See also the able opinion of Judge Jones in "The Peonage cases" 123 Fed., 671.

As is well known, in many of the States in which slavery had existed prior to the adoption of the thirteenth amendment, legislation was enacted in relation to the negroes, which practically established a system of peonage but little removed from that of slavery, and owing to the passions and prejudices aroused by the civil war, and which at that time had not yet been allayed, irresponsible persons would prevent negroes from working or cultivating lands, and the courts of the States were powerless to protect them. It will serve no useful purpose to recite in this opinion the state of affairs then existing, but a review of them may be found in the opinion of Mr. Justice Swayne in United States *vs.* Rhodes, *supra*, and in the Slaughter-House cases, 83 U. S. 36, 70, 80.

To prevent these unjust discriminations against the negro, Congress enacted this Civil Rights act, intending thereby to protect them in the enjoyment of those rights which are generally conceded to be fundamental and inherent in every freeman.

The constitutionality of this act, although it has never been directly passed upon by the Supreme Court of the United States, has been upheld by Mr. Justice Swayne, in The United States *vs.* Rhodes, *supra*, and by Chief Justice Chase, in United States *vs.* Turner, 1 Abb. (U. S.) 84, in both of which cases its constitutionality was directly involved. Mr. Justice Swayne delivered a very elaborate opinion, reviewing most thoroughly the history of the amendment and the authorities bearing upon the issues involved, epitomizing his conclusions as follows:

"It would be a remarkable anomaly if the National Gov-

18 ernment, without this amendment, could confer citizenship on aliens of every race or color, and citizenship, with civil and political rights, on the inhabitants of Louisiana and Florida, without reference to race or color, and can not, with the help of the amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them. It was passed by the Congress succeed-

ing the one which proposed the amendment. Many of the members of both houses were the same. This fact is not without weight and significance. McCulloch *vs.* Maryland, 4 Wheat. 401. The amendment reversed and annulled the original policy of the Constitution, which left it to each State to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. The whites needed no relief or protection, and they are practically unaffected by the amendment. The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects as to every one within its scope, than the consequences of a manumission by a private individual. We entertain no doubt of the constitutionality of the act in all its provisions. It gives only certain civil rights. Whether it was competent for Congress to confer political rights also, involves a different inquiry. We have not found it necessary to consider the subject."

In United States *vs.* Cruikshank, 4 Wood, 308, 319, the question before the court was the constitutionality of the enforcement act of May 31, 1870, which Mr. Justice Bradley declared to be unconstitutional as an unauthorized assumption of power by Congress under the fourteenth amendment, but in referring to the Civil Rights act in this cause involved, expressed the following opinion:

"It was supposed that the eradication of slavery and involuntary servitude of every form and description required that the slave should be made a citizen and placed on an entire equality before the law with the white citizen, and, therefore, that Congress had the power, under the amendment, to declare and effectuate these objects. The form of doing this, by extending the right of citizenship and equality before the law to persons of every race and color (except Indians not taxed and, of course, excepting the white race, whose privileges were adopted as the standard, although it embraced many persons, free colored people and others, who were already citizens in several of the States, was necessary for the purpose of settling a point which had been raised by eminent authority, that none but the white race were entitled to the rights of citizenship in this country. As disability to be a citizen and enjoy equal rights was deemed one form of badge of servitude, it was supposed that Congress had the power, under the amendment, to settle this point of doubt, and place the other races on the same plane of privilege as that occupied by the white race.

19 "Conceding this to be true (which I think it is), Congress then had the right to go further and to enforce its declaration by passing laws for the prosecution and punishment of those who should deprive, or attempt to deprive, any person of the rights thus conferred upon them. Without having this power, Congress could not enforce the amendment.

"It cannot be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to

hinder him in, the exercise and enjoyment of the rights and privileges conferred by the XIIIth amendment and the laws thus passed in pursuance thereof.

"But this power does not authorize Congress to pass laws for the punishment of ordinary crimes and offenses against persons of the colored race or any other race. That belongs to the State government alone. All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the State courts, unless, indeed, the State should deny to the class of persons referred to the equal protection of the laws. Then, of course, Congress could provide remedies for their security and protection. But, in ordinary cases, where the laws of the State are not obnoxious to the provisions of the amendment, the duty of Congress in the creation and punishment of offenses is limited to those offenses which aim at the deprivation of the colored citizen's enjoyment and exercise of his rights of citizenship and of equal protection of the laws because of his race, color, or previous condition of servitude.

"To illustrate: If in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the amendment, should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of Congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race. But if that person should be injured in his person or property by any wrong-doer for the mere felonious or wrongful purpose of malice, revenge, hatred or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the State laws only.

"To constitute an offense, therefore, of which Congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the State and its courts."

These views, as well as those expressed by Mr. Justice Swayne in United States *vs.* Rhodes, *supra*, were approved by the Supreme Court in United States *vs.* Harris, 106 U. S. 629, 640.

20 The allegations in this indictment expressly charge that these acts of the defendants were on account of the parties against whom they were directed being negroes.

Prior to the adoption of the thirteenth amendment, it had been determined by the highest court of the land that even a free negro, whose ancestors were imported into this country and sold as slaves, is not a citizen of the United States, and therefore could not sue in

the courts of the United States, and even if made a citizen by the laws of the State of his residence, the rights thus conferred upon him were limited to that State and did not entitle him to the privileges and immunities of a citizen in any other State. Scott *vs.* Sandford, 60 U. S. 393, 405. Chief Justice Taney, in delivering the opinion of the majority of the court, said:

"Each State may still confer them (the rights of citizenship) upon an alien, or any one it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which the word is used in the Constitution of the United States, or entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States.

On page 404 of that opinion it is said:

"We think they (negroes) are not (citizens), and that they are not included and were not intended to be included under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at the time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them."

Under this decision, therefore, a negro until after the enactment of the thirteenth amendment and the Civil Rights act of 1866 was, in the language of the court, "so far inferior, that he had no rights which the white man was bound to respect." 60 U. S. 407.

Although this opinion was severely criticised at the time, it was never overruled, and was at the time of the enactment of this
21 Civil Rights act regarded as the law. Obviously to remove all doubts as to the status of these people after the adoption of the thirteenth amendment and to secure to them the rights belonging of right to freemen, Congress enacted this law, declaring all persons born in the United States and not subject to any foreign power to be citizens of the United States, without regard to race, or color, and at the same session passed a resolution submitting to the States for ratification the fourteenth amendment, which provides that all persons born or naturalized in the United States shall be citizens thereof. It is therefore, beyond controversy that the negro's freedom and citizenship are rights secured to him by the Constitution and laws of the United States and which, according to the decision in the Dred Scott case, he did not possess in the absence of such legislation.

The fugitive slave act of February 12, 1793, 1st L., 302, & that of Sept. 18, 1850, 9 St. L., 462, were enacted in the exercise of the power of Congress similar to that sought to be effected by this act. By the provisions of that act it was a penal offense to knowingly and willingly obstruct or hinder the owner of the fugitive slave from seizing or arresting him; or to harbor or conceal such person after notice

that he was a fugitive slave. The constitutionality of these acts was upheld in Jones *vs.* Van Zant, 2 McLean (U. S.), 611; Prigg *vs.* Pennsylvania, 41 U. S., 539; Ableman *vs.* Booth, 62 U. S., 506, as being authorized by article 3 section 2 of the Constitution, which is not as broad as the provisions of the thirteenth amendment. That provision merely provides that:

"No person held to service or labor in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

The leading case in which this act was sustained by the
22 Supreme Court is Prigg *vs.* Pennsylvania, *supra*. It was there argued that the act of Congress was unconstitutional "because it did not fall within the scope of any of the enumerated powers of legislation confided to that body." Mr. Justice Story, who delivered the opinion of the court, in disposing of that contention said:

"Stripped of its artificial and technical structure, the argument comes to this, that although rights are exclusively secured by, or duties are exclusively imposed upon, the National Government, yet, unless the power to enforce these rights, or to execute these duties can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress; and they must operate solely *proprio vigore*, however defective may be their operation; nay, even although, in a practical sense, they may become a nullity from the want of a proper remedy to enforce them, or to provide against their violation. If this be the true interpretation of the Constitution, it must, in a great measure, fail to attain many of its avowed and positive objects, as a security of rights, and a recognition of duties. Such a limited construction of the Constitution has never yet been adopted as correct, either in theory or practice. No one has ever supposed that Congress could, constitutionally, by its legislation, exercise powers, or enact laws beyond the powers delegated to it by the Constitution. But it has on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end."

All the judges of the Supreme Court concurred in that view, the only point on which there was a dissent being whether, under the constitutional provision, the powers of Congress were exclusive of the States. Shall the courts be less liberal in construing constitutional provisions in favor of freedom than those in favor of slavery?

In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong

to every citizen, if the deprivation of these rights is solely on account of his race or color, as a denial of such rights is an
23 element of servitude within the meaning of that amendment.

In the language of Mr. Justice Field, in his dissenting opinion in the Slaughter House cases:

"The abolition of slavery and involuntary servitude was intended to make everyone born in this country a freeman and as such to give him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition and sex, and to reside in places, where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him as respects others in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction or in one place, would be almost as oppressive and nearly as great an invasion of his liberty, as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude." 83 U. S. 90.

That the right to lease lands and to accept employment as a laborer for hire are fundamental rights, inherent in every free citizen, is indisputable, and a conspiracy by two or more persons to prevent negro citizens from exercising these rights because they are negroes is a conspiracy to deprive them of a right secured to them by the Constitution and laws of the United States, within *and* meaning of section 5508, U. S. Revised Statutes.

For these reasons, the demurrer to the indictment is overruled. 125 Fed. 322.

Endorsed: No. 280 to 286. United States *vs.* A. M. Morris, *et al.* In U. S. district court at Helena, Arkansas. Criminal. Opinion of the court. Filed Oct. 15, 1903. Emerson R. Crum, clerk.

24 UNITED STATES OF AMERICA, }
Eastern Division, Eastern District of Arkansas. }

Be it remembered, that at a regular term of the district court of the United States, in and for the eastern division of the eastern district of Arkansas, begun and holden in the United States court rooms, in the city of Helena, on the 14th day of March, A. D. 1904, the same being the second Monday in said month, there was present and presiding, Honorable Jacob Trieber, U. S. district judge; Wm. G. Whipple, Esq., U. S. district attorney; A. S. Fowler, Esq.,

U. S. marshal, and Emerson R. Crum, clerk of said court, whereupon, among others, the following proceedings were had on Wednesday, March 16th, 1904, viz:

UNITED STATES
vs. } 279.
W. W. MAPLES.

On this day, on motion, this cause is continued as to defendant, W. W. Maples, on account of his illness.

25 UNITED STATES
vs.
J. R. PARKER, S. L. ROKAX, RUBE Hodge, Wm. R. Clampit, John H. Harrison, Lee Bridges, Charles Blake, Clyde Stafford, Will Stafford, Will England, Tom Gozelle, John Parker, Rube Parker, and Wash McKinney. } 279. Offence, Conspiracy.

Comes the United States, by Wm. G. Whipple, Esq., district attorney, and come the defendants to the bar of the court in answer to their recognizance, and by L. C. Going, Esq., their attorney, and having had hearing of said indictment, and being demanded concerning the premises how they will acquit themselves thereof, they saith that they are not guilty thereof, and for good or evil put themselves upon the country, and Wm. G. Whipple, Esq., district attorney, who on behalf of the United States prosecutes, doth the like, and the court in the presence of the defendants, doth proceed to empanel a jury and a jury came to-wit—John H. Darr, R. W. Friend, J. E. Jordan, E. S. Jones, Adam Reeder, T. M. Karnegay, J. H. McPherson, R. L. Benton, H. K. Smith, Vick Townley, Ed Scott and H. Brown, twelve good and lawful men of the district, who were duly tried, empaneled and sworn well and truly to try and a true deliverance make between the United States and the defendants, and a true verdict give according to the law and the evidence, and thereupon the jury proceeded to hear the evidence on the part of the United States, as well as on the part of the defendants, and having heard all the evidence and this cause not being concluded on this day the same is continued until tomorrow.

26 Fourth day of March term, 1904.

THURSDAY, *March 17th*, 1904.

Present, presiding and holding said court, Honorable Jacob Trieber, U. S. district judge, and other officers as noted on March 14th last past.

UNITED STATES
vs. } 279.
J. R. PARKER ET AL.

This cause came on for further hearing this day, and thereupon came the jurors, duly empaneled and sworn to try said cause, and having heard all the evidence and argument of counsel, and being charged and instructed by the court, retire to consider of their verdict.

UNITED STATES
vs. } 279.
J. R. PARKER ET AL.

Now come the jurors in this cause and return into court the following verdict: "We, the jury, find the following named defendants guilty as charged in the indictment, Rube Hodge, Wm. R. Clampit, Wash McKinney, and the other defendants not guilty. R. W. Friend, foreman," whereupon it is ordered by the court that defendants J. R. Parker, S. L. Rorax, Jno. H. Harrison, Lee Bridges, Charles Blake, Clyde Stafford, Will Stafford, Will England, Tom Gozelle, John Parker and Rube Parker, be discharged from said indictment and their bondsmen released, and that defendants Rube Hodge Wm. R. Clampit and Wash McKinney be taken into custody by the marshal.

27 Sixth day of March term, 1904.

SATURDAY, *March 19th*, 1904.

Present, presiding and holding said court, Honorable Jacob Trieber, U. S. district judge and other officers as noted on March 14th last past.

UNITED STATES
vs. } 279. Offense, Conspiracy,
RUBE HODGE and WILLIAM R. CLAMPIT. } Secs. 5508 and 1978.

On this day come the defendants, Rube Hodge and William R. Clampit to the bar of the court to receive sentence.

Whereupon, all and singular, the premises being seen and by the court fully understood,

It is therefore considered, ordered, adjudged and sentenced that said defendants, Rube Hodge and William R. Clampit, do pay to the United States a fine of one hundred dollars for said offense, and that the United States have execution therefor, and that they be imprisoned for and during the space of one year and one day in U. S. prison, at Atlanta, Georgia, and that said defendants be here-

inafter ineligible to any office of profit or trust created by the Constitution or laws of the United States, and that the marshal of this district convey the said prisoners to the U. S. prison aforesaid and deliver them to the custody of the keeper thereof.

And that the clerk of this court make out for said marshal two copies of this judgment and sentence, duly certified under the seal of this court, one of which the said marshal shall deliver to the keeper of said U. S. prison and the other return and file with the receipt of said keeper thereon.

28 UNITED STATES *vs.* WASH MCKINNEY. } 279. Offense, Conspiracy, Secs. 5508 and 1978.

On this day comes the defendant, Wash McKinney, to the bar of the court to receive sentence.

Whereupon, all and singular, the premises being seen and by the court fully understood,

It is therefore considered, ordered, adjudged and sentenced that said defendant Wash McKinney do pay to the United States a fine of one hundred dollars for said offense and that the United States have execution therefor, and that he be imprisoned for and during the space of sixty days in Pulaski County jail at Little Rock, Arkansas, and that said defendant be hereinafter ineligible to any office of profit or trust created by the Constitution or laws of the United States, and that the marshal of this district convey the said prisoner to the Pulaski County jail aforesaid and deliver him to the custody of the keeper thereof.

And that the clerk of this court make out for said marshal two copies of this judgment and sentence, duly certified under the seal of this court, one of which the said marshal shall deliver to the keeper of said Pulaski County jail and the other return and file with the receipt of said keeper thereon.

29 In the District Court of the United States, Eastern Division, Eastern District of Arkansas.

UNITED STATES OF AMERICA *vs.* WILLIAM R. CLAMPIT, REUBEN HODGE, and WASH MCKINNEY. } Application for Writ of Error.

To Hon. Jacob Trieber, judge of said court:

Come now the defendants, William R. Clampit, Reuben Hodge and Wash McKinney, and file herein their petition to this honorable court for a writ of error to the Supreme Court of the United States from the decision and judgment rendered in this cause, and said defendants respectfully assign the following errors:

First. That the allegations, matters and things, set out and charged in the bill of indictment under which they were tried and convicted in this court, do not constitute a public offense against the laws of the United States, and that the court erred in overruling the demurrer to the indictment.

Second. The bill of indictment against these defendants, and the jurisdiction which this court has assumed of the charges therein contained, is founded upon section- 1977, 1978 and section 5508 of the Revised Statutes of the United States and said sections are unconstitutional and void because no warrant or authority is conferred upon Congress to enact the same by the Constitution, and for the further reason that when said sections are construed together they undertake to create offenses and impose penalties in violation of the Constitution.

Third. Because the offense created by sections 1977, 1978 and 5508 of the Revised Statutes of the United States under and upon which the defendants have been indicted, tried and convicted in this court, is not constitutionally within the jurisdiction of the courts of
30 the United States and because the matters and things therein referred to, are judicially cognizable by State tribunals only, and legislative action thereon is among the rights reserved by the several States and inhibited to Congress by the Constitution.

Defendants further say that the verdict of the jury in this cause is contrary to the law, is contrary to the evidence adduced at the trial and contrary to both the law and the evidence.

Wherefore these defendants pray that a writ of error issue out of this court to the end that this cause may be reviewed by the Supreme Court of the United States, that they be granted a reasonable time within which to prepare and present to this court or the judge thereof their bill of exceptions herein, and that during the pendency of this cause, they be granted bail in a reasonable sum to be fixed by the court and for such other and further relief as in justice they may be entitled.

____ ____,
Attorney for Defendants.

Writ of error granted to Supreme Court of the United States returnable in thirty days, upon execution by the defendants William R. Clampit and Reuben Hodge of a supersedeas bond in the sum of one thousand dollars for each and a bond for five hundred dollars by Wash McKinney. Such bonds when approved by the judge or the clerk of this court to operate as a supersedeas of the judgment.

JACOB TRIEBER, *Judge.*

Endorsed: No. 279. United States *vs.* Reuben Hodge, William R. Clampit and Wash McKinney. In U. S. district court at Helena, Arkansas. Criminal. Application for writ of error. Filed March 21st, 1904. Emerson R. Crum, clerk.

31 Seventh day of March term, 1904.

MONDAY, *March* 21*st*, 1904.

Present, presiding and holding said court, Honorable Jacob Trieber, U. S. district judge, and other officers as noted on the 14th day of March last past.

UNITED STATES
vs.
WILLIAM R. CLAMPIT, RUBE HODGE, and WASH MCKINNEY. } 279.

On this day come the defendants, Rube Hodge, William R. Clampit and Wash McKinney, by their attorney, L. C. Going, Esq., and file their assignment of errors and petition for a writ of error to the Supreme Court of the United States, with the order of the judge of this court granting said appeal endorsed on said application for a writ of error, which is in words and figures following, to-wit:

Writ of error granted to the Supreme Court of the United States, returnable in thirty days, upon execution by the defendants, Reuben Hodge and William R. Clampit, of a supersedeas bond in the sum of one thousand dollars for each, and a bond for five hundred dollars by Wash McKinney, such bonds when approved by the judge or the clerk of this court to operate as a supersedeas of the judgment.

(Signed) JACOB TRIEBER, *Judge.*

And defendants also file the citation, showing service thereof, duly acknowledged by Wm. G. Whipple, Esq., United States district attorney for this district, and also file supersedeas bonds in conformity with the order of the judge of this court, approved by the judge as to said William R. Clampit and Wash McKinney, and by the clerk of this court as to said Rube Hodge, and thereupon

It was ordered by the court that execution of judgment be stayed pending the final determination on the writ of error, whereupon a writ of error was issued by the clerk, and service thereof duly acknowledged by the endorsement of Wm. G. Whipple, Esq., United States attorney for this district.

32 In the United States District Court for the Eastern District of Arkansas.

UNITED STATES, Plaintiff,
vs.
W. R. CLAMPIT, Defendant. } 279. Supersedeas Bond.

Know all men by these presents that we W. R. Clampit as principal and W. N. Watts, J. C. Mitchell, W. B. Gravette as sureties

acknowledge ourselves and are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this — day of March in the year of our Lord one thousand nine hundred and four.

Whereas lately at the March term A. D. 1904, of the United States district court for the eastern division of the eastern district of Arkansas, in a suit pending in said court between The United States of America, plaintiff and W. R. Clampit defendant a judgment and sentence was rendered against the said W. R. Clampit and the said W. R. Clampit has obtained a writ of error from the Supreme Court of the United States to reverse the judgment and sentence in the aforesaid suit and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the Supreme Court of the United States at the city of Washington thirty days from and after the date of said citation, which said citation has been duly served.

Now the condition of the above obligation is such that if the said W. R. Clampit shall appear in the Supreme Court of the United States on the first day of the next term thereof, to be held at
33 the city of Washington on the — day of October A. D. 1904, and from day to day thereafter during said term and from term to term and from time to time until finally discharged therefrom, and shall abide by and obey all orders made by the said Supreme Court of the United States in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said United States district court for the eastern division of the eastern district of Arkansas, against him shall be affirmed by the Supreme Court of the United States, then the above obligation to be void, else to remain in full force, virtue and effect.

W. R. CLAMPIT. [SEAL.]
W. N. WATTS. [SEAL.]
W. B. GRAVETTE. [SEAL.]
J. C. MITCHELL. [SEAL.]

Approved:
JACOB TRIEBER,
Judge of the Eastern District of Arkansas.

STATE OF ARKANSAS, }
County of Poinsett. }

We, W. N. Watts and W. B. Gravette and J. C. Mitchell do solemnly swear that we are the owners of the real estate in the county and State aforesaid opposite our respective names and of the value

set forth; that it is free and clear of and from all incumbrances and not our respective homesteads, and that we are each worth the sum of five hundred dollars over and above all our just debts, liabilities and exemptions, and subject to sale on execution.

34 Name.	Description of property.	Value.
W. N. Watts.	Lots 4 & 9 in block No. 13 original survey of Harrisburg, S. W. ¼ sec. 26 twp. 10 N. R. 3 E.	$1000.00
W. B. Gravette.	S. ½ N. W. ¼ sec. 26 T. 11 N. R. 3 E.	1500.00
J. C. Mitchell.	Lots 15, 16, 17, & 18 block No. 7 original survey town of Harrisburg	2000.00

W. N. WATTS.
W. B. GRAVETTE.
J. C. MITCHELL.

Sworn and subscribed to before me this 19th day of March, 1904.

LOUIS G. MINTON,
Notary Public.

[SEAL.]

My commission expires Jan. 15th, 1907.

Endorsed: No. 279. United States *vs.* Wm. R. Clampit. In U. S. district court at Helena, Arkansas. Supersedeas bond. Filed Mar. 21st, 1904. Emerson R. Crum, clerk.

35 In the United States District Court for the Eastern District of Arkansas.

UNITED STATES, Plaintiff,
vs.
WASH MCKINNEY, Defendant. } 279. Supersedeas Bond.

Know all men by these presents that we Wash McKinney as principal and B. A. McKinney, L. C. Going and J. A. Bradsher as sureties acknowledge ourselves and are held and firmly bound unto the United States of America in the full and just sum of five hundred dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this — day of March in the year of our Lord one thousand nine hundred and four.

Whereas lately at the March term A. D. 1904, of the United States district court for the eastern division of the eastern district of Arkansas, in a suit pending in said court between The United States of America, plaintiff and Wash McKinney defendant a judgment and

sentence was rendered against the said Wash McKinney and the said Wash McKinney has obtained a writ of error from the Supreme Court of the United States to reverse the judgment and sentence in the aforesaid suit and a citation directed to the said United States of America citing and admonishing the United States of America to be and appear in the Supreme Court of the United States at the city of Washington thirty days from and after the date of said citation, which said citation has been duly served.

Now the condition of the above obligation is such that if the said Wash McKinney shall appear in the Supreme Court of the United States on the first day of the next term thereof, to be held at
36 the city of Washington on the — day of October A. D. 1904, and from day to day thereafter during said term and from term to term and from time to time until finally discharged therefrom, and shall abide by and obey all orders made by the said Supreme Court of the United States in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said United — district court for the eastern division of the eastern district of Arkansas, against him shall be affirmed by the Supreme Court of the United States, then the above obligation to be void, else to remain in full force, virtue and effect.

WASH McKINNEY. [SEAL.]
B. A. McKINNEY. [SEAL.]
L. C. GOING. [SEAL.]
J. A. BRADSHER. [SEAL.]

Approved:

JACOB TRIEBER,
Judge of the Eastern District of Arkansas.

STATE OF ARKANSAS, }
County of Poinsett. }

We, Ben A. McKinney and L. C. Going, J. A. Bradsher do solemnly swear, that we are the owners of the real estate in the county and State aforesaid opposite our names & of the value set forth, that it is free from all liens & not our respective homesteads.

		Value.	
Ben McKinney.	N. ½ N. E. ¼ sec. 18 twp. 10 N. r'ge 4 E.....	300	
	S. ½ S. E. and N. W. S. E. ¼ sec. 22 twp. 10 N. r'ge 3 E.....	500	800.00
L. C. Going.	Lots 7 & 8 block 13 original survey of Harrisburg.....		3000.00
J. A. Bradsher.	S. W. ¼ sec. 21 twp. 11 N. r'ge 3 east.		1000.00

& that we are each worth the sum of five hundred dollars, over & above all our just debts & liabilities & not exempt from execution.

37

J. A. BRADSHER.
B. A. McKINNEY.
L. C. GOING.

Subscribed and sworn to before me this 19 day of March, 1904.

LOUIS G. MINTON,
Notary Public.

[SEAL.]

My commission expires Jan. 15th, '07.

Endorsed: No. 279. United States *vs.* Wash McKinney. In U. S. district court at Helena, Arkansas. Supersedeas bond. Filed March 21st, 1904. Emerson R. Crum, clerk.

38 In the United States District Court for the Eastern District of Arkansas.

UNITED STATES, Plaintiff,
vs.
RUBE HODGE, Defendant. } 279. Supersedeas Bond.

Know all men by these presents that we Rube Hodge as principal and John Hodge, J. C. Mitchell, Benj. Harris, J. A. Bradsher and W. H. Joiner as sureties acknowledge ourselves and are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 21 day of March in the year of our Lord one thousand nine hundred and four.

Whereas lately at the March term A. D. 1904, of the United States district court for the eastern division of the eastern district of Arkansas, in a suit pending in said court between The United States of America, plaintiff, and Rube Hodge, defendant, a judgment and sentence was rendered against the said Rube Hodge and the said Rube Hodge has obtained a writ of error from the Supreme Court of the United States to reverse the judgment and sentence in the aforesaid suit and a citation directed to the said United States of America citing and admonishing the United States of America to be and appear in the Supreme Court of the United States at the city of Washington thirty days from and after the date of said citation, which said citation has been duly served.

Now the condition of the above obligation is such that if the said Rube Hodge shall appear in the Supreme Court of the United States on the first day of the next term thereof, to be held at the city of Washington on the — day of October A. D. 1904, and
39 from day to day thereafter during said term and from term to term and from time to time until finally discharged therefrom, and shall abide by and obey all orders made by the said Supreme Court of the United States in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said United States district court for the eastern division of the eastern district of Arkansas, against him shall be affirmed by the Supreme Court of the United States, then the above obligation to be void, else to remain in full force, virtue and effect.

his
RUBE x HODGE. [SEAL.]
mark
his
JOHN x HODGE. [SEAL.]
mark
J. C. MITCHELL. [SEAL.]
BENJ. HARRIS. [SEAL.]
J. A. BRADSHER. [SEAL.]
W. H. JOINER. [SEAL.]

Witness:
GUY C. WORTHLEY.
Witness:
W. W. NELMS.

Approved:
EMERSON R. CRUM,
Clerk of the U. S. District Court
at Helena, Arkansas.

STATE OF ARKANSAS, } *ss:*
County of Poinsett, }

We, J. C. Mitchell, Benj. Harris and J. E. Bradsher do solemnly swear that we are the owners of the real estate in the county and State aforesaid opposite our respective names and of the value set forth; that it is free and clear of and from all incumbrances and not our respective homesteads, and that we are each worth the sum of five hundred dollars over and above all our just debts, lia-
40 bilities and exemptions, and subject to sale on execution:

Name.	Description of property.	Value.
J. C. Mitchell.	Lots 15, 16, 17, and 18, block No. 7, original survey, town of Harrisburg.....	$2000.00
Benj. Harris.	E. ½ N. E. & N. ½ S. E. sec. 15 town 11 N. 3 E. 160 acres valued.....	800.00
J. A. Bradsher.	S. W. ¼ sec. 21, twp. 11 N., range 3 east...	1000.00

J. C. MITCHELL.
BENJ. HARRIS.
J. A. BRADSHER.
his
JOHN x HODGE.
mark

Witness:
W. W. NELMS.

Subscribed and sworn to before me this the 21st day of March, A. D. 1904.

B. F. COLE, *Clerk*,
[SEAL.] By W. W. NELMS, *D. C.*

Endorsed: No. 279 United States *vs.* Rube Hodge. In U. S. district court, at Helena, Arkansas. Supersedeas bond. Filed March 26th, 1904. Emerson R. Crum, clerk.

41 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern division of the eastern district of Arkansas, wherein Reuben Hodges, William R. Clampit and Wash McKinney, are plaintiffs, and The United States of America, is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

In witness whereof, I have hereunto affixed my name this the 21st day of March, in the year of our Lord, one thousand nine hundred and four, and in the 128th year of our Independence.

{Seal of the United States Court, Eastern District Arkansas, Helena.}

JACOB TRIEBER,
United States District Judge for the Eastern District of Arkansas, Presiding.

Attest:
EMERSON R. CRUM, *Clerk.*

I hereby acknowledge service of the above citation on behalf of the United States, this 21st day of March, A. D. 1904.

WM. G. WHIPPLE,
United States District Attorney for the Eastern District of Arkansas.

[Endorsed:] No. 279. United States *vs.* Wm. R. Clampit, Rube Hodge and Wash McKinney. United States district court, eastern district of Arkansas, eastern division. Citation. Filed March 21st, 1904. Emerson R. Crum, clerk.

42 UNITED STATES OF AMERICA, }
Eastern Division, Eastern District of Arkansas. }

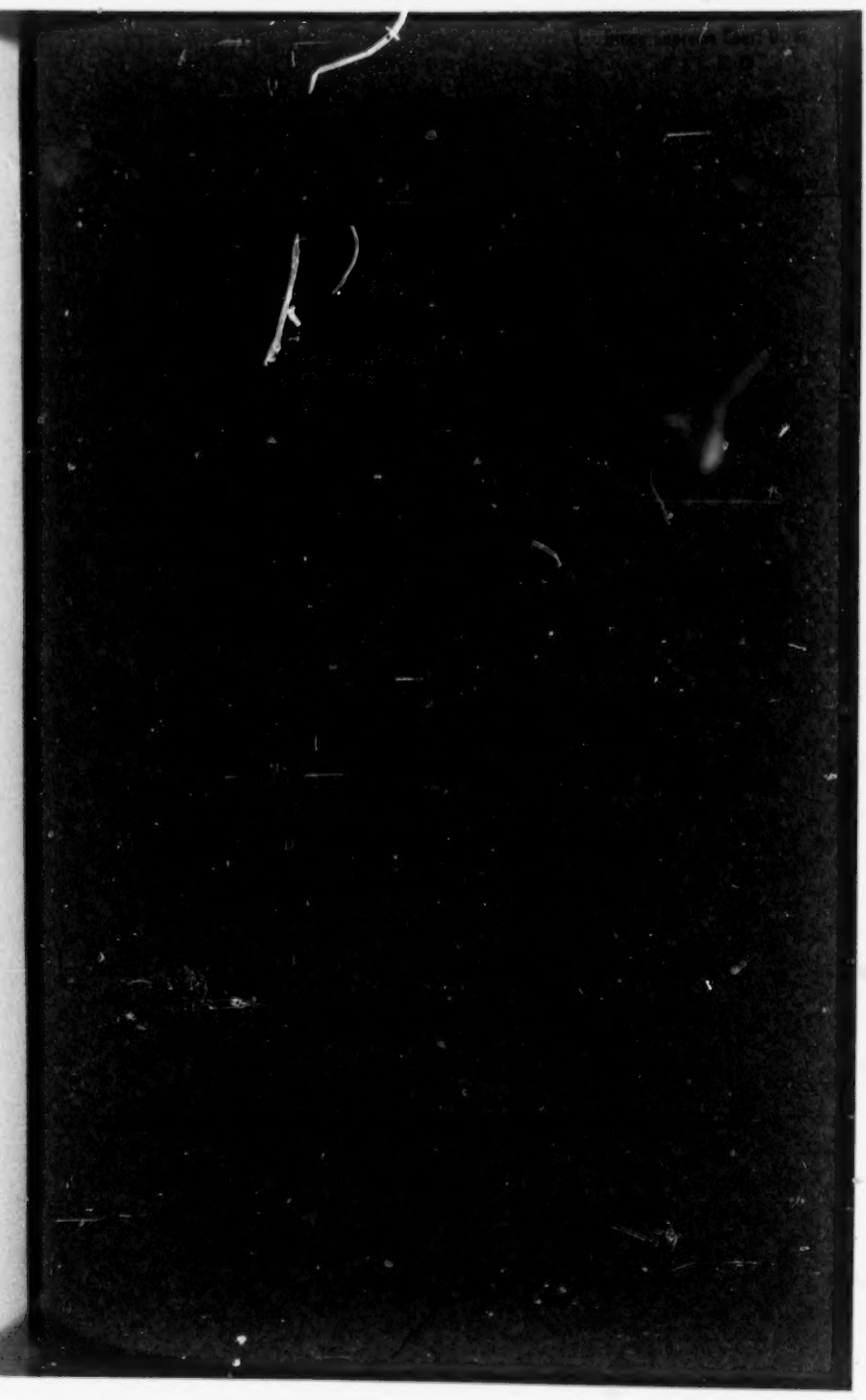
I, Emerson R. Crum, clerk of the district court of the United States, in and for the eastern division of the eastern district of Arkansas, do hereby certify that the foregoing forty-one typewritten pages, numbered from 1 to 41, both inclusive, contain a true and compared copy of the record and proceedings in the cause of United States *vs.* Wm. R. Clampit, Rube Hodge and Wash McKinney, as the same remains of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said district court, at office in the city of Helena, this the 6th day of April, A. D. 1904.

{ Seal of the United States Court, Eastern District Arkansas, Helena. }

EMERSON R. CRUM, *Clerk.*

Endorsed on cover: File No. 19,305. E. Arkansas D. C. U. S. Term No. 230. Reuben Hodges, William R. Clampit, and Wash McKinney, plaintiffs in error, *vs.* The United States. Filed April 22d, 1904. File No. 19,305.



In The Supreme Court of the United States.

Reuben Hodges, William R. Clampit and Wash McKinney, Plaintiffs in Error,

vs. No. ~~280~~. 14

The United States, Defendant in Error.

Abstract, Argument and Brief

FOR PLAINTIFFS IN ERROR.

Argument.

At the October term, 1903, of the District Court of the United States in and for the Eastern Division of the Eastern District of Arkansas the grand jury returned a bill of indictment against plaintiffs in error. Stripped of its technical allegations, said indictment charged that the defendants (plaintiffs in error) did, on the 17th day of August, 1903, unlawfully and wilfully conspire together to threaten, oppress and intimidate Berry Winn et al., citizens of the United States, of African descent, in the free exercise and enjoyment of rights and privi-

leges *secured* to them by the Constitution and laws of the United States, and because of their having exercised the same, to-wit:

That said Berry Winn et al., having entered into contracts with Davis & Hodges, a sawmill partnership, by which they, the said Berry Winn et al., were to perform labor for Davis & Hodges and receive compensation therefor, and while so performing said contract, the conspirators notified said Berry Winn et al. that they must cease said labor and abandon said contracts, and by threatening that unless they did so abandon said contracts, they would injure said Berry Winn et al.

Brief and Argument.

DOES THE INDICTMENT ALLEGE FACTS SUFFICIENT TO CONSTITUTE A PUBLIC OFFENSE AGAINST THE LAWS OF THE UNITED STATES?

The indictment in this case is predicated upon the two sections of the Revised Statutes of the United States, mentioned in the demurrer, the first of which (Section 1977) reads as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to *make* and *enforce contracts,* to sue and be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, license and exactions of every kind, and to no other."

Section 5508 reads as follows:

"If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway or on the

premises of another with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

That said conspiracy was formed because the said Berry Winn et al. were citizens of African descent, and by reason of said conspiracy, threats and intimidation, so performed by said conspirators, said Berry Winn et al. were prevented from carrying out their said contracts with said Davis and Hodge.

(See Tr., p. 3.)

To this indictment said defendants filed their demurrer, assigning the following reasons why the same should be sustained:

First—The matters, things and allegations therein contained do not constitute a public offense against the laws of the United States.

Second—Section 1977 of the Revised Statutes of the United States, upon which the indictment is founded, is unconstitutional.

Third—Section 1977 of the Revised Statutes, when taken and construed with Section 5508 of the same, in so far as it creates offenses and imposes penalties, is in violation of the Constitution.

Fourth—Because the offense created by the said sections are not within the jurisdiction of the United States, and are cognizable before State tribunals only.

(Tr., pp. 5 and 6.)

Said demurrer was overruled (Tr., pp. 7 to 17, inclusive), and said defendants (plaintiffs in error) were tried, convicted and sentenced to serve one year and a day in the penitentiary at Atlanta, Ga., and to pay a fine of one hundred dollars (Tr., p. 20), sued out a writ of error (Tr., p. 21), which was granted (Tr., p. 21), and executed their bonds as required by law, and filed a transcript of the proceedings in said court (Tr., p. 1) within the time provided by law.

The Government in this case contends that Congress found its authority for the enactment of Section 1977 in the Thirteenth Amendment to the Constitution, and that under said amendment and act of Congress, the African citizens of this country acquired the right to contract, and to prevent which the conspiracy is alleged to have been formed. The indictment alleged that the *right secured* to the African citizens therein named was the right "to contract their services to Davis & Hodge for compensation."

The learned district judge, in his written opinion overruling the demurrer to the indictment, sustains the position of the Government, that the "right enjoyed by the African citizens set out in the indictment was a *right* secured to them under the Constitution and the laws of the United States."

In U. S. vs. Cruikshank, 92 U. S. 542, this court said:

"To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States. If it does not so appear the criminal matter charged has not been made indictable by any act of Congress."

This language was used by the court in passing upon a statute very similar to the one in question, and a section of the same act under consideration. True, in the Cruikshank case the indictment was more vague and uncertain than the indictment in this case. The court in the Cruikshank case, at page 569, makes use of this language: "All rights are not so granted or secured. Whether one is so or not is a question of law to be decided by the court, not the prosecutor."

This case is resolved into a simple question: *Is the right to contract one guaranteed or secured by the Constitution or laws of the United States?*

This is practically the first question presented by the demurrer to the indictment in the case at bar. In other words, is the right of a citizen of African descent to make or enforce a contract a right granted or secured to him by the Constitution or laws of the United States?

We are constrained to believe that the learned district judge failed to recognize the distinction between rights *declared* and *recognized*, but not *granted* or *secured* by the constitution and laws. It would seem that such a distinction exists and has been noticed by this court.

In Logan vs. U. S., 144 U. S., 263, it is said (286):

"Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected."

Further, in the same case, at page 287, it is further said:

"It was of these fundamental rights of life and liberty, not created by or dependent upon the Constitution, that the courts said, 'Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State than it would be to punish for false imprisonment or murder itself.' "

And again, at page 289, it is said:

"With regard to those acknowledged rights and privileges of the citizen, which form a part of his political inheritance derived from the mother country, and which were challenged and vindicated by centuries of stubborn resistance to arbitrary power, they belong to him as his birthright, and it is the duty of the particular State of which he is a citizen to protect and enforce them and to do naught to deprive him of their full enjoyment. When any of these rights and privileges are secured in the Constitution of the United States only by a declaration that the State or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the Constitution, but that the Constitution only guarantees that they shall not be impaired by the State. * * * The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it, but belongs to the State government as a part of its residuary sovereignty."

Can it be said that the right to contract is conferred upon any citizen by any part of the Constitution of the

United States? Is it to be presumed that the simple adoption of the Thirteenth Amendment gave the negro any greater rights as a citizen than a white man?

Citizenship under the laws of the various States of this Union is not essential to the right to contract. Aliens are permitted to contract, and to have and enforce the same rights in reference thereto as citizens. The right to contract existed long prior to the Declaration of Independence, or the adoption of the Constitution of the United States. The Thirteenth Amendment did nothing more than to create or make a freeman of a slave. Since he became a freeman the municipal laws of the land give to him the right to contract, to use and be sued in the State or municipality in which he resides.

This court has held that the right to pursue or follow any of the ordinary vocations of life are not created by the Constitution or laws of the United States, but are among the inherent and inalienable rights of man, and are, therefore, not dependent for their existence upon the Constitution.

> Butchers' Union vs. Crescent City Co., 111 U. S. 746.

In speaking of the character of legislation involved in this suit this court said in the civil rights cases, 109 U. S. 3-13, of the Thirteenth Amendment, at page 842 (Law Edition):

"It is true that slavery cannot exist without law any more than property in lands and goods can exist without law; and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. * * * Conceding the major propo-

sition to be true, that Congress has a right to enact all necessary or proper laws for the obliteration and prevention of slavery, with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance or theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery?'"

In the case at bar, admitting the facts alleged in the indictment to be true, does it follow that the conspiracy upon a part of certain individuals to intimidate or interfere with a negro citizen in the performance of his contract fasten upon the negro any badge of slavery? Would it be held to fasten a badge of slavery upon a white man if his right to contract should be interfered with by intimidations or threats?

We do not believe that this or any other court has ever held such to be the case. The most that can be said of the acts alleged in the indictment is that they are a violation or in violation of the criminal laws of the State of Arkansas. It is a mere breach of the peace. The Thirteenth Amendment has respect not to distinction of race or class or color, but to slavery. The allegation in the indictment that the persons said to be intimidated by the defendants were persons of African descent does not give more efficiency to the indictment than it would otherwise have.

The Constitution prohibits a State from passing a law impairing the obligation of a contract. This did not give Congress power to provide laws for general enforcement of contracts, nor power to invest the courts

of the United States with power over contracts so as to enable parties to sue upon them in these courts.

In Civil Rights Cases, *supra*, page 840 (Law Edition), it is said: "Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of State Legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property, which include all civil rights that men have, are by amendment sought to be protected against invasion on the part of the State without due process of law, Congress may, therefore, provide due process of law for their vindication in every case."

An example of some of the rights guaranteed or secured by the Constitution and laws of the United States are such as patents, trade marks, right to homestead public lands, to vote in Federal elections, etc.

United States vs. Waddell, 112 U. S. 76.

But a conspiracy to intimidate and compel officers of a mining company to discharge their employes, or to compel the employes to leave the service of the company, is not an offense against the laws of the United States.

Pettibone vs. United States, 149 U. S. 202.

The reason is that the right, the enjoyment of which the conspirators are intending to deprive is not a right secured by the Constitution or laws of the United States.

It is contended by the government that the injured persons are negroes, or citizens of African descent, and that the indictment charges that the right which they enjoy, and to prevent which a conspiracy was formed, is a right secured to them under and by virtue of the Thirteenth Amendment to the Constitution, and the laws passed by Congress in pursuance thereto. The learned district judge, in his opinion overruling the demurrer herein to the indictment (Tr., p. 8), said:

"If the power to enact the legislation involved in this proceeding exists at all, it must have been granted by some of the provisions of the last three amendments to the Constitution, the thirteenth, fourteenth and fifteenth."

The learned district judge, because of the allegation in the demurrer, that sections 1979 and 5508 were unconstitutional, appears to have given more attention to this ground of the demurrer than to the first ground, which challenges the sufficiency of the indictment. While it may be true that both the sections referred to are constitutional, the indictment does not come within the provisions of either, for the reason that the facts alleged and upon which it sought to base the prosecution is a mere interference by one individual with the right of another to contract. And, if such be true, an individual, whether white or black, has the right of redress either in the criminal or civil courts of the State of Arkansas.

The Emancipation Proclamation, by removing the disability of slavery, made the negro a citizen, and placed

him upon the same plane before the law as the white race.

U. S. vs. Rhodes, 1 Abb. 28.

1 Kent Com., 298 and note.

State vs. Manuel, 4 Dev. & Batt. (N. C). 28.

In the last-mentioned authority will be found an unanswerable argument upon that proposition. In discussing the question of a free negro, Judge Gaston, speaking for the court, said: "Under the laws of this State, all human beings within it who are not slaves fall within one of two classes, aliens or citizens. Slaves manumitted here become free men, and all free persons born within the State are citizens."

This case was cited and approved in:

State vs. Newsom, 5 Ired. (N. C.) 250.

If the emancipation of a native born slave, by removing the disability of slavery, made him a citizen, without any further act of Congress, then hand in hand came with it all the rights, duties and privileges accorded to the white man, under the Constitution and laws of the nation. If, on the other hand, the African citizen acquired his rights of life, liberty and pursuit of happiness, which includes the right to contract, from the statutes under consideration or the Thirteenth Amendment, he has acquired rights, privileges and protection by virtue of that instrument which the white man, by whom it was made, did not and could not secure to himself. The white man is powerless to invoke the aid of the courts of the United States to protect him against a con-

spiracy to injure, oppress, threaten or intimidate him in the enjoyment of his right to contract, because that is not a right guaranteed or secured to him by the Constitution or laws. And any lawless number of citizens of African descent can conspire together for the purpose of depriving a white man of the privilege of completing a contract already made, and yet the white man has no protection from the United States courts.

According to the theory of the Government in this case, when the *color* is changed and the white man becomes the conspirator, and the citizen of African descent the victim, the strong arm of the government can and will be stretched forth to protect the citizen of African descent. It cannot be possible that the Thirteenth Amendment can give to the Congress of the United States the right to enact a code of municipal laws merely for the purpose of protecting citizens of African descent in their right to contract.

If individuals should undertake to enforce upon citizens of African descent or upon any other persons any form or badge of slavery, it cannot be doubted that this would make a cause of action cognizable in the United States courts.

The peonage cases recently decided in the United States District Court, for the district of Alabama, are all illustrations of the applicability of the laws under discussion.

In discussing the constitutionality of section 5519 of the Revised Statutes, this court, in the case of the United States vs. Harris, 106 U. S. 626 (S. C. 16 Otto 629-644), this court said, at page 294 (Law Ed.):

"Under that section it would be an offense for two or more white persons to conspire for the purpose of depriving any white person of the equal protection of the laws. It would be an offense for two or more colored persons, enfranchised slaves, to conspire with the same purpose against a white citizen or against any colored citizen who had never been a slave. Even if the amendment is held to be directed against the action of private individuals as well as against the States and the United States, the law under consideration covers cases both within and without the provisions of the amendment. * * * A law under which two or more free white private citizens could be punished for conspiring or going in disguise for the purpose of depriving any other free white citizen of a right accorded by the law of the State to all classes of persons, as, for instance, the *right to make a contract,* bring a suit or give evidence, clearly cannot be authorized by the amendment which simply prohibits slavery or involuntary servitude."

Can it be said, in the face of this decision, that it is a violation of the Thirteenth Amendment, or of any law of the United States based upon it, for white citizens to conspire, to threaten, intimidate or interfere with citizens of African descent in their right to contract? This certainly cannot be one of the rights guaranteed or secured by the Thirteenth Amendment, or any of the laws based upon it.

We believe that it can be safely said there is no decision in this court which even tends to support the conclusion of the learned district judge.

The act of these defendants in marching to a place where the citizens of African descent were engaged in

labor and by threats and intimidation causing them to stop work is not a case cognizable by the United States courts.

The indictment in no place alleges that the defendants or either of them went in disguise upon the highway or premises of another person. The indictment wholly ignores this feature of the statute. It seems from the indictment before the court that the defendants proceeded openly and without any disguise. This is a penal statute, and under the rule adopted by all courts must be strictly construed. The allegation would, therefore, be insufficient if it failed to allege that the defendants or some of them went in disguise on the highway and premises of another. The last clause of the statute being, "or if two or more persons go in disguise on the highway or on the premises of another with intent to prevent or hinder his free exercise or enjoyment of any right or privilege secured," etc., the allegation in the indictment is that the defendants undertook, being then and there armed with deadly weapons, to threaten and intimidate the workmen there employed, with the purpose of compelling them by force and threat, and otherwise, to remove from said place of business, to stop said work and to cease the enjoyment of said right and privilege, meaning the right and privilege of contract.

It is very clear that the law is not applicable to the facts alleged in the indictment.

For this reason we submit that the case should be reversed, with direction to sustain the first ground of the demurrer.

Respectfully submitted,

JAMES P. CLARKE,
L. C. GOING,
Attorneys for Plaintiffs in Error.
J. F. GAUTNEY,
Of Counsel.

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Clerk.

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Clerk.
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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

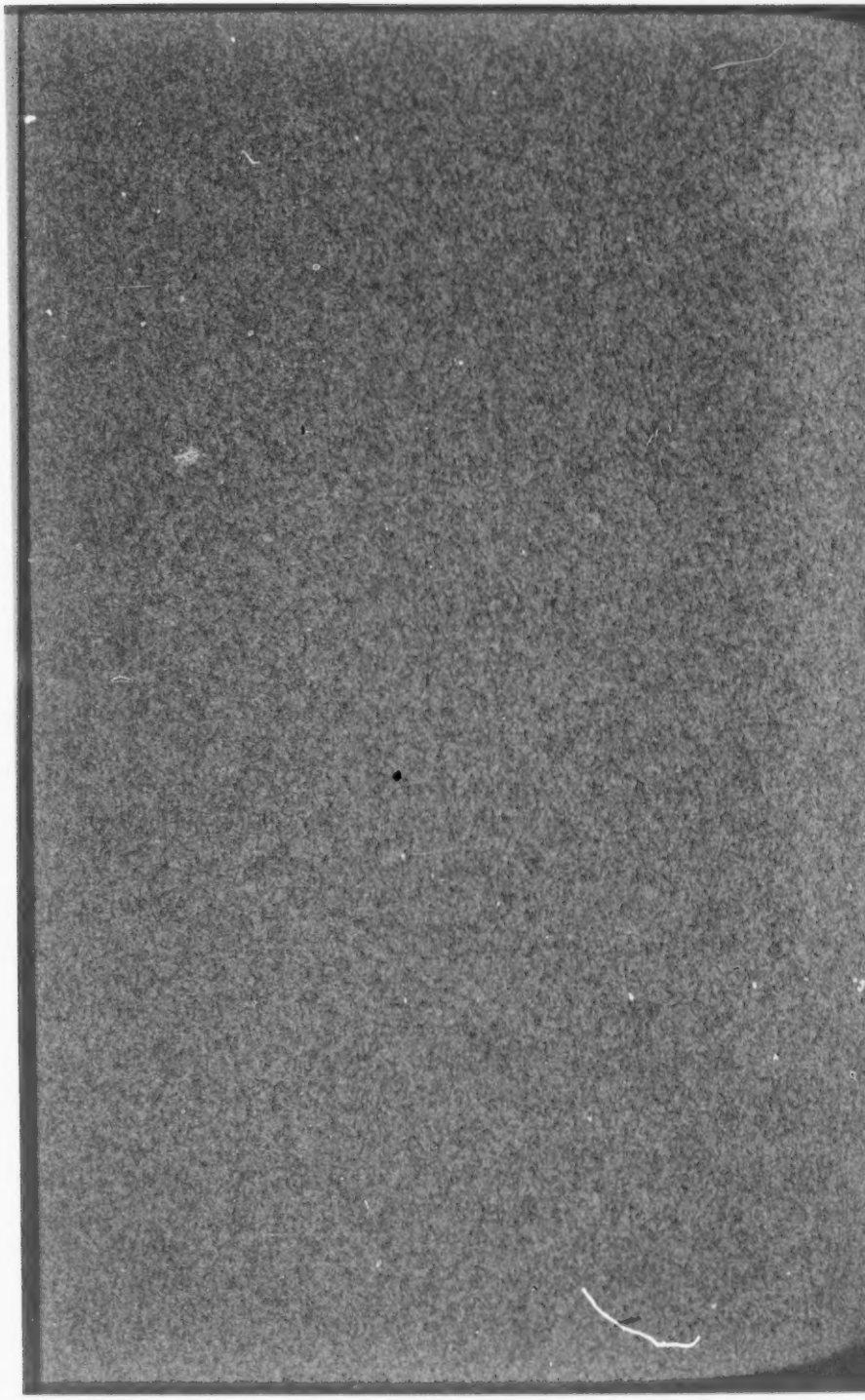
REUBEN HODGES, WILLIAM R. CLAMPIT, and Wash McKinney, plaintiffs in error,

v.

THE UNITED STATES.

No. 14.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1905.

REUBEN HODGES, WILLIAM R. CLAMPIT, and WASH McKINNEY, plaintiffs in error,
v.
THE UNITED STATES.
No. 14.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This is a writ of error from this court to the District Court of the United States for the Eastern District of Arkansas.

Appellants, with twelve others, were indicted at the October term, 1903, of said district court, under section 5508 of the Revised Statutes of the United States, which makes it an offense for two or more persons to conspire to injure or oppress, threaten or intimidate any citizen of the United States in the free exercise or enjoyment of any right or privilege guaranteed to him by the Constitution and laws of the United States, or because of his having so exercised the same. (Rec., 3.)

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The indictment, in substance, charges that the fifteen defendants therein named, pursuant to a conspiracy for the purpose, caused certain citizens of the United States of African descent, *because of their color*, to abandon certain contracts of employment they had entered into, by threatening and intimidating them with deadly weapons. (Rec., pp. 3–5.)

The defendants demurred (Rec. 5), demurrer was overruled (Rec. 7), and, after pleas of not guilty (Rec. 18), twelve defendants were found not guilty, and the three appellants guilty (Rec. 19), whereupon they sued out this writ of error (Rec. 20).

Upon the record the only questions raised are those contained in the causes of demurrer, as follows (Rec. 6):

First. That the allegations, matters, and things set out and charged in said bill of indictment do not constitute a public offense against the laws of the United States.

Second. Said bill of indictment is founded and based upon section 1977 of the Revised Statutes of the United States, being a portion of an act of the Congress of the United States, approved on May 31, 1870, and said section is unconstitutional and void because no warrant or authority is conferred by the Constitution of the United States upon the Congress thereof to enact the same.

Third. Said section, when taken and construed together with section 5508 of the Revised Statutes of the United States in so far as it creates offenses and imposes penalties, is in violation of the Constitution of

the United States and an infringement on the rights of the several States and the people thereof.

Fourth. Because the offense created by sections 1977 and 5508 of the Revised Statutes of the United States, under and upon which the indictment herein is based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only, and legislative action thereon is among the rights reserved to the several States and inhibited to Congress by the Constitution.

THE STATUTES RELATING TO CIVIL RIGHTS.

SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence,

and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both.

THE QUESTION OF LAW.

Has a colored citizen of the United States of African descent a right secured to him by the Constitution or laws of the United States to work at any particular occupation or calling—as, for example, in the capacity of a common laborer in the manufacture of lumber—and therefore free from injury, oppression, or interference on the part of individual citizens, when the motive for such injury, oppression, or interference arises solely from the fact that such laborer is a colored person of African descent?

THE GOVERNMENT'S POSITION.

It will be observed that this question of law does not involve the constitutionality of section 5508 of the Revised Statutes (which is not open to doubt, *Motes* v. *United States*, 178 U. S., 458), but simply the question whether the phrase "any right or privilege secured to him by the Constitution or laws of the United States," includes the right charged in this indictment as having been secured to the colored citizens who were driven away from work by the unlawful acts of individuals.

In the case of *United States* v. *Cruikshank et al.* 92 U. S., 545, this court held that the general rule is that sovereignty for the protection of the inalienable rights of life and personal liberty rests alone with the States and that "it is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or a murder within a State than it would be to punish for false imprisonment or murder itself."

In the case of *Logan* v. *The United States* 144 U. S., 263, 293, Mr. Justice Gray, delivering the opinion of the court, said:

> The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and can not therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right created by, arising under, or dependent upon the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

With these decisions, and many others that might be cited, before us, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens.

Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State.

Unless, therefore, the additional element, to wit, the infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the State laws.

In the *Cruikshank case* (*supra*) this question was left open. *United States* v. *Cruikshank*, 92 U. S., 542, 555.

The Congress of the United States has attempted to secure such a right by section 1977, above set forth, and the question at once arises as to the authority of Congress to enact such legislation.

Consideration of the various constitutional provisions under which the right to enact section 1977 might be claimed.

Bearing in mind that the indictment does not allege that the appellants acted under color of any State authority; that the case presented is one of the concerted action of individuals, acting solely on their own responsibility, we approach the consideration of the Constitution.

In what may be called the old Constitution—the Constitution as it stood before the war amendments—there were no provisions which could be invoked to support section 1977.

Article IV, section 2, provided:

> The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

If this section were not inapplicable on other

grounds, it could not be invoked here, for it is prohibitive only of State action.

Paul v. *Virginia*, 8 Wall., 168.
Ward v. *Maryland*, 12 Wall., 418.
Slaughter-House cases, 16 Wall., 36.
United States v. *Harris*, 106 U. S., 629, 643.
Blake v. *McClung*, 172 U. S., 236.

And for a similar reason the power can not be sought in the fourteenth amendment.

United States v. *Reese*, 92 U. S., 214.
United States v. *Cruikshank*, 92 U. S., 542.
Virginia v. *Rives*, 100 U. S., 313.
Ex parte Virginia, 100 U. S., 339.
Civil Rights cases, 109 U. S., 3.
United States v. *Harris*, 106 U. S., 629.
James v. *Bowman*, 190 U. S., 127.

This court has recently decided that, under the Thirteenth Amendment, Congress may enact laws operating primarily upon individuals (*United States* v. *Clyatt*, 197 U. S., 207), and if section 1977 can not be sustained under that amendment the Government's case must fail.

The Thirteenth Amendment provides as follows:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime wherof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

(Proposed by Congress February 1, 1865, and declared in force December 18, 1865.)

THE THIRTEENTH AMENDMENT WAS INTENDED TO SECURE TO THE COLORED RACE PRACTICAL FREEDOM.

As is well known, this was the first of the war amendments. Prior thereto the status of the individual was within the exclusive control of the States, with, perhaps, the single exception that no State could grant a title of nobility. Each State determined for itself whether slavery should exist within its borders and by what rules it should be governed. The war amendments worked a considerable change; there was a reassignment of power, and by them a certain part of the authority previously exercised by the States was by the people withdrawn and conferred upon the nation.

At the time the thirteenth amendment was adopted the condition of the colored race was well known. In the *Dred Scott* case, which attracted widespread attention, it was said that the negro had no rights which a white man was bound to respect. His status was graphically and accurately described by Mr. Howard in a speech made in the Senate when the act of April 9, 1866, the parent of section 1977, was under consideration. He said:

> What is a slave in contemplation of American law, in contemplation of the laws of all the slave States? We know full well; the history of two hundred years teaches us that he had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife,

> or even for friend. He owned no property, because the law prohibited him. He could not take real or personal estate, either by sale, by grant, or by descent or inheritance. He did not own the bread he earned and ate. He stood upon the face of the earth completely isolated from the society in which he happened to be; he was nothing but a chattel, subject to the will of his owner, and unprotected in his rights by the law of the State where he happened to live. His rights, did I say? No, sir; I use inappropriate language. He had no rights. He was an animal; he was property, a chattel. The Almighty, according to the ideas of the times, had made him to be property, a chattel, and not a man. (Cong. Globe, vol. 69, p. 504.)

With these distinct ideas of the status of the colored race, with the knowledge that 200,000 of them had enlisted in the armies of freedom to aid in suppressing the rebellion in the insurrectionary States, the Thirteenth Amendment was added to the Constitution by the people.

The official declaration of the adoption of the Thirteenth Amendment was made December 18, 1865, and on January 5, 1866, Mr. Trumbull, chairman of the Senate Judiciary Committee, who had been chiefly instrumental in securing the proposal of the Thirteenth Amendment by Congress, introduced Senate bill No. 61, which became the act of April 9, 1866, Chapter XXXI.

When passed, the act, entitled "An act to protect all persons in the United States in their civil rights,

and furnish the means of their vindication," provided in its first section:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

From the date of the act it appears that it was enacted under the Thirteenth Amendment, for the Fourteenth Amendment was not proposed by Congress until June 16, 1866. And in the debates, indeed, the earlier amendment was solely invoked as a justification for its passage.

In introducing the bill Mr. Trumbull said that the Thirteenth Amendment declared all persons to be free, and that the purpose of the bill was to secure to all persons within the United States practical freedom. He called attention to laws passed by the legislatures which

had assembled in the insurrectionary States, discriminating against the freedmen, and putting upon them the very same restrictions imposed upon them in consequence of the existence of slavery before it was abolished. (Cong. Globe, No. 69, p. 474.)

Proceeding to consider the power of Congress to pass the bill, he said (Ib., p. 475):

> Then, under the constitutional amendment which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States. The various State laws to which I have referred—and there are many others—although they do not make a man an absolute slave, yet deprive him of the rights of a free man; and it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman. A law that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void.

The bill was supported, also, by Mr. Howard, a member of the Senate Judiciary Committee. He said (Ib., p. 503):

I happened to be a member of the Judiciary Committee at the time this amendment was drafted and adopted and reported to the Senate. I recollect very distinctly what were the views entertained by members of that committee at the time it was under consideration by them. And notwithstanding the very vehement style of the Senator from Pennsylvania (Mr. Cowan, who opposed the bill) in placing a narrow and utterly ineffectual construction upon it, I take this occasion to say that it was in contemplation of its friends and advocates to give to Congress precisely the power over the subject of slavery and the freedmen which is proposed to be exercised by the bill now under our consideration.

It was easy to foresee, and of course we foresaw, that in case this scheme of emancipation was carried out in the rebel States it would encounter the most vehement resistance on the part of the old slaveholders. It was easy to look far enough into the future to perceive that it would be an unwelcome measure to them, and that they would resort to every means in their power to prevent what they called the loss of their property under this amendment. We could foresee easily enough that they would use, if they should be permitted to do so by the General Government, all the powers of the State governments in restraining and circumscribing the rights and privileges which are plainly given by it to the emancipated negro.

The bill was opposed on constitutional and other grounds, passed the Senate and House by overwhelm-

ing majorities, was vetoed by President Johnson, passed over his veto, and became the act of April 9, 1866, chapter XXXI, 14 Stats., 27.

From the foregoing extracts from the speeches of members of Congress—and they could be multiplied to great length—and from the more than two-thirds vote which the act of 1866 received in both Houses of Congress, coupled with the fact that many who voted for the bill were members of the Congress which proposed the Thirteenth Amendment, and doubtless explained its terms to their constituents, who adopted it, we have a contemporaneous construction of the meaning of that amendment entitled to the greatest weight. *McCulloch* v. *Maryland*, 4 Wheat, 401.

It is proposed next to examine the cases wherein the Thirteenth Amendment has been considered.

Slaughter-house cases (16 Wall., 36): In these cases the court was concerned with certain questions growing out of the grant by the legislature of Louisiana to a slaughter-house company of exclusive privileges. It was claimed by counsel that the legislation was void under the Thirteenth Amendment, because that amendment forbade certain servitudes which had attached to *property* in feudal Europe.

This court said, after quoting the amendment (p. 69):

> To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic

> search endeavor to find in it a reference to servitudes, which may have been attached to *property* in certain localities, requires an effort, to say the least of it.

To confirm and illustrate the view that property servitudes were not contemplated, the opinion proceeds:

> That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings.

This was all that was required to refute the position which the court assumed that counsel took.

In this case the Chief Justice, Mr. Justice Swayne, Mr. Justice Bradley, and Mr. Justice Field dissented.

Mr. Justice Field rested his objections to the validity of the legislation upon the Fourteenth Amendment. However, he made some observations upon the scope of the Thirteenth Amendment which, although not authoritative, are entitled to respect.

He said (p. 90):

> The words "involuntary servitude" have not been the subject of any judicial or legislative exposition that I am aware of in this country, except that which is found in the Civil Rights Act, which will be hereafter noticed. It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make every one

born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude.

United States v. *Harris* (106 U. S., 629).

In this case this court declared section 5519 of the Revised Statutes of the United States unconstitutional. Section 5519 provided as follows:

> SEC. 5519. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the

> equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment with or without hard labor not less than six months nor more than six years, or by both such fine and imprisonment.

In considering whether this section could be supported under the Thirteenth Amendment, it was said (p. 641):

> Even if the amendment is held to be directed against the action of private individuals, as well as against the action of the States and United States, the law under consideration covers cases both within and without the provisions of the amendment. It covers any conspiracy between two free white men against another free white man to deprive him of any right accorded him by the laws of the State or of the United States. A law under which two or more free white private citizens could be punished for conspiring or going in disguise for the purpose of depriving another free white citizen of a right accorded by the law of the State to all classes of persons—as, for instance, the right to make a contract, bring a suit, or give evidence—clearly can not be authorized by the amendment which simply prohibits slavery and involuntary servitude.

This language is seized upon by the appellants as conclusively showing that a law which carefully limits the jurisdiction of the nation to offenses against persons *on account of their color* is unconstitutional. Obviously, all that the court meant to say was that section 5519, because not so limited in its operation, was broader than the Thirteenth Amendment contemplated.

In confirmation of this explanation the following extract from a prior part of the opinion is illuminating (p. 640):

> We are next to consider whether the Thirteenth Amendment to the Constitution furnishes authority for the enactment of the section. This amendment declares that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." "Congress shall have power to enforce this article by appropriate legislation."
>
> It is clear that this amendment, besides abolishing forever slavery and involuntary servitude within the United States, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure. Mr. Justice Swayne, in *United States* v. *Rhodes*, 1 Abb. (U. S.), 28; Mr. Justice Bradley, in *United States* v. *Cruikshank*, 1 Woods, 308.

> Congress has, by virtue of this amendment, declared, in section 1 of the act of April 9, 1866, chapter 31, that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to none other.
>
> But the question with which we have to deal is, Does the Thirteenth Amendment warrant the enactment of section 5519 of the Revised Statutes? We are of opinion that it does not. Our conclusion is based on the fact that the provisions of that section are broader than the Thirteenth Amendment would justify. Under that section it would be an offense for two or more white persons to conspire, etc., for the purpose of depriving another white person of the equal protection of the laws. It would be an offense for two or more colored persons, enfranchised slaves, to conspire with the same purpose against a white citizen or against another colored citizen who had never been a slave.

This language plainly shows that the court did not doubt the validity of the act of April 9, 1866, and the two cases, cited with express approval, both uphold the constitutionality of the act of April 9, 1866.

United States v. *Rhoades*, 1 Abb. (U. S.), 28.
United States v. *Cruikshank*, 1 Woods, 308, 319.

The last sentence in the foregoing extract does not impair the argument that the Thirteenth Amendment was intended to secure practical freedom, but is an apt illustration in aid of the argument, for it shows that the court had in mind the distinction between interference with a man's rights because of his color, and interference for ordinary motives of private gain.

Civil rights cases 109 U. S., 3: These cases arose from the enactment of the Civil Rights Act of 1875, which provided that the negro, equally with the white man, should have accommodation in public places of amusement, hotels, and public conveyances.

In attempting to find authority in the Thirteenth Amendment to support the act of 1875, the theory was advanced that that amendment gave Congress power to abolish all badges of slavery, and that it was a badge of slavery to be denied the rights secured by the act on account of color. The court, however, did not find it necessary to consider this question, because it held that the denial of the *social* rights attempted to be secured by the act of 1875, as distinguished from the *fundamental* rights secured by the act of 1866, did not amount to the imposition of a badge of slavery.

In speaking of the act of April 9, 1866, it was said (p. 22):

> The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property,

to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterwards received from the Fourteenth Amendment, after the adoption of which it was reenacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

In this case Mr. Justice Harlan dissented, taking the view that Congress, under the Thirteenth Amendment, had power to legislate to protect freemen from the imposition of badges of slavery, and that the act of 1875 was appropriate to the end. He considered that the validity of the act of 1866 was involved, and held it to be constitutional. He said (p. 35):

> That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character for the eradication not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the foundation of the Civil Rights act of 1866. Whether that act was authorized by the Thirteenth Amendment alone, without the support which it subsequently received from the Fourteenth Amendment, after the adoption of which it was reenacted with some additions, my brethren do not consider it necessary to inquire. But I submit, with all respect to them, that its constitutionality is conclusively shown by their opinion. They admit, as I have said, that the Thirteenth Amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that Congress, by the act of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color,

and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens; that under the Thirteenth Amendment Congress has to do with slavery and its incidents; and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not. These propositions being conceded, it is impossible, as it seems to me, to question the constitutional validity of the Civil-Rights act of 1866. I do not contend that the Thirteenth Amendment invests Congress with authority, by legislation, to define and regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several States. But I hold that since slavery, as the court has repeatedly declared (*Slaughterhouse cases*, 16 Wall., 36; *Strauder* v. *West Virginia*, 100 U. S., 303), was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from and protection against all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the depriva-

> tion, *because of their race*, of any civil rights granted to other freemen in the same State, and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and also upon at least such individuals and corporations as exercise public functions and wield power and authority under the State.
>
> *Clyatt* v. *United States*, 197 U. S. 207.

In this case, after conceding that as a general proposition the ordinary relations of individual to individual are subject to the control of the States and not intrusted to the nation, this court held that the Thirteenth Amendment, unlike the Fourteenth and Fifteenth, gives Congress power to enact legislation, direct and primary in character, operating upon the acts of individuals, whether sanctioned by State authority or not.

The Thirteenth Amendment has been considered in some other cases in this court, but an examination of them is not material to the discussion of this case.

> *Plessy* v. *Ferguson*, 163 U. S., 537.
> *Robertson* v. *Baldwin*, 165 U. S., 275.

From the foregoing discussion it appears that this court has never held that the Thirteenth Amendment was not broad enough to permit of legislation such as is contained in section 1977. We have seen, on the contrary, that Mr. Justice Field and Mr. Justice Harlan have given the support of their opinions to the validity of the parent enactment.

> *Slaughter-house cases*, 16 Wall., 36, 90, 91.
> *Civil Rights cases*, 109 U. S., 3, 35.

The validity of the act of April 9, 1866, was sustained in several cases in the lower courts of the United States, and in the State courts.

In *United States* v. *Rhodes*, 1 Abb. (U. S.) 28, Mr. Justice Swayne considered the act very fully and upheld its constitutionality in all its parts.

See, also, *Matter of Elizabeth Turner*, 1 (Abb. (U. S.) 84), decided by Mr. Chief Justice Chase.

Smith v. *Moody*, 26 Ind., 299, 306, 307.

People v. *Washington*, 36 Cal., 658.

United States v. *Cruikshank*, 1 Woods, 308, 319, opinion by Mr. Justice Bradley.

In *United States* v. *Rhodes*, Mr. Justice Swayne said (p. 55):

> Throughout the war the African race had evinced entire sympathy with the Union cause. At the close of the rebellion two hundred thousand had become soldiers in the Union armies. The race had strong claims upon the justice and generosity of the nation. Weighty considerations of policy, humanity, and right were superadded. Slavery, in fact, still subsisted in thirteen States. Its simple abolition, leaving these laws and this exclusive power of the States over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing

> to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to Congress the requisite authority, and to leave no room for doubt or cavil upon the subject. The results have shown the wisdom of this forecast. Almost simultaneously with the adoption of the amendment this course of legislative oppression was begun. Hence, doubtless, the passage of the act under consideration. In the presence of these facts, who will say it is not an "*appropriate*" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.

In *United States* v. *Cruikshank*, Mr. Justice Bradley said (p. 319):

> It can not be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the Thirteenth Amendment and the laws thus passed in pursuance thereof.
>
> But this power does not authorize Congress to pass laws for the punishment of ordinary crimes and offenses against persons of the

colored race or any other race. That belongs to the State government alone. All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the State courts, unless, indeed, the State should deny to the class of persons referred to the equal protection of the laws. Then, of course, Congress could provide remedies for their security and protection. But in ordinary cases where the laws of the State are not obnoxious to the provisions of the amendment, the duty of Congress in the creation and punishment of offenses is limited to those offenses which aim at the deprivation of the colored citizen's enjoyment and exercise of his rights of citizenship and of equal protection of the laws because of his race, color, or previous condition of servitude.

To illustrate: If, in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the amendment, should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it can not be doubted that this would be a case within the power of Congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race. But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred, or gain, without any design to interfere with his rights of citizenship or equality before the laws, as

> being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the state laws only.
>
> To constitute an offense, therefore, of which Congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the state and its courts.

The act of 1866 was held to be unconstitutional in a dissenting opinion in *People* v. *Washington* (*supra*), and in *Bowlin* v. *Commonwealth* (2 Bush, (Ky.) 5).

From the above authorities and extracts from speeches in Congress, the Gove ment contends that the people, having clear notions of the status of the colored race and of what attempts would be made to return it to its servile condition, intended by the Thirteenth Amendment to grant and secure practical freedom. It outrages our feelings of humanity to believe that the men who had fought to free the slaves merely intended to sever the legal ligament which bound the slave to his master, leaving the latter at liberty to cut him off from the fundamental rights which white men enjoyed. Such a narrow construction leaves the black race in a state made worse by their emancipation, by the breaking of the cord of self-interest which bound the slaveholder to take care of his property. That motive would disappear with the adoption of the amendment, and the people must have

foreseen that the former slaveholders would strive, by individual action and through the reconstructed legislatures in the late rebellious States, to prevent the freedmen from acquiring property, suing in the courts, giving evidence, and in a great variety of ways endeavor to prevent those whom they regarded as intended by the Almighty to be bondsmen from enjoying the practical rights of freemen.

For this purpose the people used in the amendment language which this court has said permits Congress to enact legislation operating directly to punish the acts of individuals, not sanctioned by any color of State authority. *Clyatt* v. *United States*, 197 U. S., 207.

The framers of that amendment were familiar with the provisions of the Constitution, and with that which gave Congress power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

Those who framed the second section, as said by Mr. Justice Harlan in the civil rights cases (p. 34)—

> were not ignorant of the discussions covering many years of our country's history, as to the constitutional power of Congress to enact the fugitive slave laws of 1793 and 1850. When, therefore, it was determined, by a change in the fundamental law, to uproot the institution of slavery wherever it existed in the land, and to

> establish universal freedom, there was a fixed purpose to place the authority of Congress in the premises beyond the possibility of a doubt.

The cases upholding the constitutionality of the fugitive slave laws are important, and will now be considered because they give us the rule by which to determine what is appropriate legislation.

Prigg v. *Pennsylvania*, 16 Peters, 539.
Ableman v. *Booth*, 21 How., 506.

The Constitution provided, Article III, section 2:

> No person held to service or labor in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due.

Under this provision Congress passed two fugitive slave laws—the law of 1793 and the law of 1850. Each of those acts was legislation not corrective of State action, but operating directly upon individuals; each provided for the infliction of a penalty upon any man who should aid a fugitive slave in his escape from his owner. These statutes were before this court in the above cases, and were held to be constitutional.

In the *Prigg case* (*supra*), Mr. Justice Story said (p. 618):

> But it has been argued that the act of Congress is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body;

and therefore it is void. Stripped of its artificial and technical structure, the argument comes to this, that although rights are exclusively secured by, or duties are exclusively imposed upon, the National Government, yet, unless the power to enforce these rights or to execute these duties can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress; and they must operate solely *proprio vigore*, however defective may be their operation; nay, even although in a practical sense, they may become a nullity from the want of a proper remedy to enforce them or to provide against their violation. If this be the true interpretation of the Constitution, it must, in a great measure, fail to attain many of its avowed and positive objects, as a security of rights and a recognition of duties. Such a limited construction of the Constitution has never yet been adopted as correct, either in theory or practice. No one has ever supposed that Congress could, constitutionally, by its legislation, exercise powers or enact laws, beyond the powers delegated to it by the Constitution. But it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.

There was a dissent in this case, but it conflicted in no way with the views expressed above. See, also, *McCulloch* v. *Maryland*, 4 Wheat., 401.

If Congress had the implied power to enact laws for the security of the master's property in his slave, shall it be said that the express grant of power given by the Thirteenth Amendment does not confer the right to legislate for practical freedom?

The Constitution, in all its parts, is to be given a broad, liberal construction, in accord with the spirit of its framers. It is not to be narrowly interpreted, and the derivative meaning of words closely followed. The history of the times, its contemporaneous construction, all extrinsic as well as intrinsic evidence as to its meaning, are to be studied. None of its parts were conceived to be construed as a code of laws; it is to be viewed, on the contrary, as a charter of liberties.

Thus contemplated the Thirteenth Amendment, adopted for the avowed purpose of eradicating slavery of every kind and description, with all its incidents, interpreted by the men who proposed it as intended to secure to the negro practical freedom, protects him in the free enjoyment of the fundamental rights which inhere in freedom, the denial of which, as was said in the *Civil Rights cases*, 109 U. S., 3, 22, constituted the substance and visible form of slavery.

If these premises be admitted it follows that legislation, like section 1977, which declares that the black and white races shall be upon an equality in the enjoyment of these rights, is apt and appropriate.

Thus far it has been assumed that sections 1977 and 5508 were intended to protect the colored race from the acts of individuals, not done under color of State authority. It is now proposed to examine those sections more particularly, and to define their meaning.

The intent of Congress, expressed in sections 1977 and 5508, is to make it an offense for individuals, acting in combination, to injure or oppress the negro, solely because of his color, in his right to make and enforce contracts.

The act of April 9, 1866 (14 Stat., 27), was reenacted in the Enforcement Act of 1870. Act of May 31, 1870 (16 Stat., 140). In the latter act section 16 was, for all material purposes, like section 1 of the act of 1866 (which is set out hereinbefore at p. 11). Both sections in those acts, after the declaration that the negro should be upon an equality with the white man in the right to make and enforce contracts, sue, be a witness, purchase and inherit property, etc., contained these words: "Any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." In 1866, and again in 1870, therefore, Congress did not attempt to protect the negro from the acts of individuals, unless they were done under the sanction, or supposed sanction, of some State law or custom.

That Congress had power to go further, and enact legislation acting primarily on individuals, admits of no doubt. *Clyatt* v. *United States*, 197 U. S., 207.

And in the revision of the statutes of the United States the Congress exercised that power to its fullest extent by omitting the words above quoted.

It is true that section 1979 qualifies section 1977, so far that a civil action for the deprivation of civil rights can not be maintained unless the wrong was done under color of some State or Territorial statute or usage, and that section 1977 is also qualified by section 5510, so that no individual acting alone can be prosecuted for the deprivation of civil rights unless he acted under color of State or Territorial authority. However, the case presented is that of a combination of individuals to deprive of rights, and, for that case, the expressed intention of Congress is to provide protection against the lawless acts of individuals. If Congress had not so intended it would have introduced into section 5508, after the word "persons," the words "under color of any law statute, ordinance, regulation, or custom," or words of similar import, as it did in sections 5510 and 1979.

That no other construction is permissible is conclusively shown by referring to section 5596, Revised Statutes of the United States, which provides, so far as material, as follows:

> SEC. 5596. All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts having been repealed or superseded by subsequent acts, or not being general and permanent in their nature * * *.

As was said in *United States* v. *Bowen*, 100 U. S., 508, 513:

> The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the 1st day of December, 1873. When the meaning is plain the courts can not look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.

There is no ambiguity in sections 1977 and 5508, and, therefore, reference can not be made to the acts of 1866 and 1870. As those sections stand in the Revised Statutes they plainly indicate an intention to make the concerted action of several for the purpose of depriving a negro of civil rights, because of his color, a national crime, when they act without color of State authority.

In conclusion, it is proposed to consider briefly some objections that have been urged, and which may be urged, against the views hereinbefore set forth.

CONSIDERATION OF OBJECTIONS TO GOVERNMENT'S POSITION.

Appellants state in their brief (p. 6):

> This case is resolved into a simple question: Is the right to contract one guaranteed or secured by the Constitution or laws of the United States?

If the foregoing discussion has been to any purpose it has been shown, on the contrary, that the

question in this case is whether the Constitution and laws of the United States have secured to the negro the right not to be interfered with, solely on account of his color, in the enjoyment of rights necessary to secure to him practical freedom.

Appellants refer to the cases which were reviewed in *Logan's case* (144 U. S., 263), where it was practically held that where the Constitution recognizes and declares rights as already existing before its adoption, Congress can not legislate to protect persons in the exercise of such inalienable rights from the acts of individuals unless they act under the sanction of State authority; that it rests wholly with the States to protect one individual from another in the enjoyment of inalienable rights. Proceeding with this argument, they call attention to the concurring opinion of Mr. Justice Field in *Butchers' Union* v. *Crescent City Co.* (111 U. S., 746, 757), where he said the right to pursue any lawful business or vocation is an inalienable right.

It needs but a moment's reflection to perceive that the colored race, in this country, never possessed this, or any other right, until it was granted and secured—not recognized and declared—by the Thirteenth Amendment, and the laws passed in pursuance thereof. If rights are granted and secured by constitutional enactments, Congress may legislate to protect those rights against individual action.

United States v. *Reese*, 92 U. S., 214.
Strauder v. *West Virginia*, 100 U. S., 303.
Ex parte Virginia, 100 U. S., 339.
Ex parte Yarbrough, 110 U. S., 651.

United States v. *Waddell*, 112 U. S., 76.
Baldwin v. *Franks*, 120 U. S., 678.
Logan v. *United States*, 144 U. S., 263.
Motes v. *United States*, 178 U. S., 458.

In *Clyatt* v. *United States* (197 U. S., 207), not cited by appellants, it was held that the Thirteenth Amendment, unlike the Fourteenth and Fifteenth, gives Congress authority to enact legislation operating upon individuals.

At page 9 of appellant's brief, this question is asked:

> Would it be held to fasten a badge of slavery upon a white man if his right to contract should be interfered with by intimidations or threats?

The Government does not so contend, for the reason that the power of the nation can not be invoked unless rights essential to the enjoyment of freedom have been infringed solely on account of color.

In the case of *Scott* v. *Sandford* (19 How., 393), it was decided that slaves were not citizens. The emancipation proclamation made them free, and it may be admitted, made them citizens of the United States, but it did not secure to them practical freedom. That was done by the Thirteenth Amendment, and because, under that amendment Congress may enact legislation acting primarily upon individuals, it may punish those who attempt by concerted action to deprive the negro of his right to contract solely for the reason that he is a negro. If a conspiracy should be entered into by blacks to hinder a white man, solely on account of his color, from making and enforcing contracts, Congress could legislate for such a case. That question

does not arise in this case, nor whether sections 1977 and 5508 would apply.

Appellants admit the case when they say (p. 13 of their brief):

> If individuals should undertake to enforce upon citizens of African descent, or upon any other persons, any form or badge of slavery, it can not be doubted that this would make a cause of action cognizable in the United States courts.

If a few individuals can combine to hinder the negro, because of his race, in the pursuit of employment, they can, by persistent, progressive acts, deprive him of every right the free enjoyment of which is necessary to keep him from returning again into practical bondage. Must he wait until he has been terrified into abstaining from exercising all his rights before he can call upon the nation? It is idle to say that the laws of Arkansas leave the courts open to him, for intimidation, like that alleged in this indictment, so effective that it causes the negro not only to abandon his contract, but to leave the place of its performance, utterly nullifies those laws.

Finally, appellants contend that if these sections be constitutional the indictment does not make a case within section 5508, because it is not alleged that the defendants therein named went in disguise.

It is not proposed to notice this contention further than to point out that section 5508 in its first clause, under which this indictment was drawn, does not require the allegation as to disguise, which applies only

to the offense defined in the second clause of the section. (See act of May 31, 1870, chapter 114, section 6, 16 Stats., 140, 141.)

One other point remains: It might be urged that the proposal of the Fourteenth Amendment shows that Congress had no power to enact section 1977 under the Thirteenth Amendment. A conclusive answer to this reasoning is that the same Congress which passed the act of 1866, within a month thereafter began the consideration of what is now the Fourteenth Amendment, and during nearly all the time that Senate bill No. 61, which became the act of 1866, was under consideration, was discussing various proposed amendments which involved ideas similar to those contained in the Fourteenth Amendment (see Cong. Globe, No. 70, p. 1033 et seq.).

As was said by Mr. Justice Gray in *Wong Kim Ark's case*, 169 U. S., 649, 675, referring to the civil-rights act of 1866, and the Congress which passed it:

> The same Congress shortly afterwards, evidently thinking it unwise and perhaps unsafe to leave so important a declaration of rights (that now contained in sections 1977 and 1978 of the Revised Statutes of the United States) to depend upon an ordinary act of legislation which might be repealed by any subsequent Congress, framed the Fourteenth Amendment of the Constitution, and on June 16, 1866, by joint resolution, proposed it to the legislatures of the several States. * * *

But the adoption of the Fourteenth Amendment could not take away from Congress its power to pass

legislation operating upon individuals. *Clyatt* v. *United States*, 197 U. S., 207.

Finally, it is respectfully suggested that if there be doubt whether the legislation of Congress, section 1977, be constitutional, the doubt should be resolved in favor of its validity according to the rule so well expressed by Mr. Justice Washington in *Ogden* v. *Saunders*, 12 Wheat., 213, where he said:

> If I could rest my opinion in favor of the constitutionality of the law * * * on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but decent respect due to the * * * legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt.

Respectfully submitted.

MILTON D. PURDY,
The Assistant to the Attorney-General.

OTIS J. CARLTON,
Special Assistant to the Attorney-General.

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FILE COPY

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

REUBEN W. HODGES ET AL.
v.
THE UNITED STATES. } No. 14.

IN ERROR TO THE DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS.

ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE UNITED STATES.

MAY IT PLEASE YOUR HONORS:

At the October term, 1903, an indictment was returned in the District Court for the Eastern Division of the Eastern District of Arkansas. In the indictment it is alleged, by way of inducement, that certain persons therein named, being citizens of African descent, had entered into contracts for their services as laborers and workmen in the business of manufacturing lumber, with a copartnership which conducted that business; that in entering into these contracts they exercised a right and privilege conferred upon them by the thirteenth amendment to the Constitution of the United States; that the plaintiffs in error and certain other persons had entered into a conspiracy to deprive these colored citizens of the exercise of their right under the

Constitution to contract for their labor, by threats, intimidation, and force; that in the execution of that conspiracy they were driven from their work; and that this conspiracy was entered into and executed because these laborers were colored men and citizens of African descent.

It is inconceivable, your honors, that the conduct which is set out in this indictment would not be regarded as a crime in any community not made up of barbarians. I have no doubt whatever that it is a crime under the laws of the State of Arkansas. The question here is, whether it also is a crime against any law of the United States, constitutionally operative within the territory of the State of Arkansas.

The defendants interposed a demurrer. In which four reasons for demurrer were alleged. I need not read them. In substance the demurrer objects to the indictment because it does not state any crime against any law of the United States, which it was within the constitutional power of Congress to enact; but, on the other hand, sets forth an offense cognizable only by the courts of the State.

The demurrer was overruled in an elaborate written opinion, which appears in the record. (Rec. pp. 7–17.) The case was then tried to a jury. Certain of the defendants named in the indictment were acquitted and the plaintiffs in error were convicted. A petition for a writ of error was then filed, based upon the same objection which was contained in the demurrer, and one additional objection—that the verdict was against the

evidence. That additional objection may readily pass out of view, because there is no report of the evidence in the record and no question upon it raised otherwise than by the petition for a writ of error. The writ of error was duly granted, the case is here upon that writ, and raises the question raised by the demurrer—whether a crime against the United States or against any law of the United States constitutionally operative within the State of Arkansas is set forth in the indictment. The indictment is based upon section 5508 of the Revised Statutes, one of the surviving sections of the early civil-rights legislation. That section, or rather the material part of it, I will read to your honors:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same," * * * they shall be punished in the manner prescribed in the statute.

There is no other statute upon which this indictment could stand. The decision in the court below proceeded upon the theory that a crime against the provisions of this section had been set forth in the indictment.

That raises this precise question: Has a negro the right to contract for his own personal labor and in the execution of that contract the right to be exempt from concerted force and intimidation because of his race, secured by the Constitution of the United States and

protected by any law of the United States passed in pursuance of the power conferred upon Congress by the Constitution?

Mr. Justice BROWN. Does the statute cover cases of negroes, or more?

The ATTORNEY-GENERAL. The statute covers even more than that. The statute under which this indictment was found punishes a conspiracy to deprive any person of any right or privilege secured to him by the Constitution of the United States.

Mr. Justice BROWN. That would include white persons?

The ATTORNEY-GENERAL. It might if white persons have a racial right to be exempt from intimidation and force in the exercise of any right which is an essential part of freedom. The question here is, whether under this statute a negro, under the circumstances that I have stated, has the right to labor, and to be exempt from interference with that labor, secured to him by the Constitution of the United States.

Mr. Justice BREWER. Do you draw any distinction between the right of a negro to make a contract and the right of a white man?

The ATTORNEY-GENERAL. No, sir. I shall proceed upon a broader theory and a broader interpretation of the law. Section 5508 of the Revised Statutes, the penal section upon which this indictment must rest, punishes a conspiracy for the deprivation "of any right or privilege secured by the Constitution or laws of the United States." In order to bring the facts stated in

this indictment, and found by the jury to be true, within the purview of this penal statute, I must show that the right of these colored citizens of which they were deprived was a right secured by the Constitution or the laws of the United States.

Of course, it is immaterial whether the negro has any such right secured to him by the laws of the State of Arkansas. If he has not the right secured to him by the Constitution and laws of the United States, that is the end of this case, and the persons who were wronged in the manner set forth in this indictment have no other remedy than that which may be afforded them by the courts of the State of Arkansas.

It is very clear that no such right as that claimed in the case at bar was secured to the citizen by the original Constitution or by any of the earlier amendments to the Constitution. If the right exists at all, as a national right under the protection of the national power, it exists by virtue of something contained in the three war amendments. No such right exists by virtue of the fourteenth amendment to the Constitution, because that amendment, it seems now to be settled, in all its clauses, is prohibitive solely of State action; and laws constitutionally authorized under that amendment can only be corrective of the action of the State through its legislative, executive, or judicial department. It is equally obvious that no such right exists by virtue of the fifteenth amendment—first, because the fifteenth amendment deals with political rights only; and second, because it, like the fourteenth amendment, is prohibitive only of State action. If then the right

exists at all, it exists by virtue of the thirteenth amendment to the Constitution. Familiar as it is, I will read it:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

Before considering the interpretation of that amendment and inquiring whether the right here before the court was conferred by it, let me dispose of two preliminary, though essential, questions in this case. Let me assume for a moment that such a right is conferred by the thirteenth amendment. If that be so, then Congress has the right to enact laws which operate directly and primarily upon the people—upon the individual—as distinguished from laws which only operate in correcting State action. This was precisely decided by this court, without dissent, in the recent case of *Clyatt* v. *United States* (197 U. S., 207), which was a case of peonage coming from the State of Alabama. It is important here, because the section of the Revised Statutes upon which this indictment is based is a law, not corrective of State action, but acting directly and primarily upon individuals.

Second, section 5508, upon which this indictment is based, is constitutional. That has been affirmed repeatedly by decisions of this court to which I will allude only briefly.

The right to vote at a Federal election (*Ex parte Yarborough*, 110 U. S., 651); the right to remain on a homestead entry for the purpose of perfecting the title (*United States* v. *Waddell*, 112 U. S., 76); the right of protection while in the custody, upon a charge of crime, of the officers of the United States (*Logan* v. *United States*, 144 U. S., 263), and the right to furnish information to the authorities of violations of the laws of the United States (*In re Quarles*, 158 U. S., 532; *Motes* v. *United States*, 178 U. S., 458) were each held to be rights belonging to the citizen derived from the Constitution and laws of the United States, or to use the words of the statute, secured by the Constitution or laws of the United States, the deprivation of which by a conspiracy was punishable by this section of the Revised Statutes.

It will be observed that Congress has yet directed no penal statute against individual action—the action of a single person depriving another of a right secured to him by the national Constitution. Congress has heretofore only dealt with the punishment of concerted action to that end. Of course, it would be within the power of Congress to deal with an individual offender if it chose to do so.

Having then determined that for the vindication of a right secured by the Constitution Congress may enact laws operating primarily and directly upon the individual, and that this section upon which this indictment is based is a constitutional exercise of the authority of Congress, the question then arises, Is the denial to a

negro of the right to labor, a denial based upon his race alone, a denial inspired by race hostility—the denial of a right secured to him by the thirteenth amendment to the Constitution? The position of the Government is this:

Where a man is forcibly denied, on account of his race or color, the right to earn his own bread by the sweat of his own brow, he is denied one of the essential rights of freedom, and to that extent is forced into a position of involuntary servitude.

Referring to your Honor's (Mr. Justice Brewer's) question of a few moments ago, an argument might be made distinguishing the African race in this regard from all other races. Much countenance for that distinction might be found. The distinction is based primarily upon the decision in the Dred Scott case where this court held that members of that race, whether slave or free, were not citizens of the United States, and were entitled only to such rights as the law might confer upon them. It might then be said, that the thirteenth amendment was an act of national naturalization; that the whole negro race obtained its right of citizenship as well as its right of freedom from that amendment, and that therefore that race, by that amendment, had been forever put in a place of peculiar safety, and its freedom and citizenship derived solely from the Constitution of the United States, and therefore entitled to its peculiar protection.

The utterances of statesmen and jurists, near the time the war amendments were passed, indicate that in

their minds the war amendments might be regarded as affecting the negro race alone. Mr. Justice Swayne, in the case of the *United States* v. *Rhodes* (1 Abbott, 28), speaking of this amendment, said: "The whites needed no relief or protection, and they are practically unaffected by the amendment." There never has been a time when there was not some qualification of that statement, a qualification which distinctly appears in the *Slaughter House cases* (16 Wallace, 36), in the utterances of Mr. Justice Miller, where he states that the pervading purpose of the three war amendments was the freedom, the citizenship, the equality of the negro race, but points out at great length that those amendments would also protect the rights of all other races.

At this day it is perfectly clear by the repeated decisions of this court that all three of those amendments are to be applied to all kinds and classes of our people. Notably the cases under the fourteenth amendment have carried that amendment beyond the mere protection of the African race. In two recent cases it has been shown very clearly that the view of this court is, that the benefits of the thirteenth amendment are not confined to the negro race.

In the case of *Robertson* v. *Baldwin* (165 U. S., 275), while the court divided upon the question whether the compulsory return of a sailor, under a statute enacted for that purpose, to serve out his contract of shipment, was a holding of him in the condition of involuntary servitude, no member thought that it was at all material to the case that the sailor, who was a party to the

cause, was a white man. In the *Clyatt case* (197 U. S., 207), although the persons actually held in a state of peonage were negroes, yet there is nothing in the opinion which indicates that anything turned upon that consideration, and the statute which was upheld punished the holding in peonage of any person, white, black, red, or brown. Moreover, the history of the origin of that statute shows very clearly that it was not directed to the enfranchisement of the negro race, but dealt with the freedom of the Indian and Mexican races. Therefore, for these reasons, I am not willing in my discussion to confine the benefits of this great charter of freedom to any one of the races that go to make up the American people.

It is true that the thirteenth amendment had a peculiar effect upon the African race. It was an act of national emancipation—it broke the bonds which held that race in slavery. But it was more than an act abolishing the institution of slavery. In the words of Mr. Justice Bradley, its reflex action established affirmatively in every person residing within the jurisdiction of the United States the right to be free. Before the thirteenth amendment was adopted, freedom was not secured to any of the people of the United States by the Constitution of the United States. The Constitution in all its parts contemplated a government by a free people. The Constitution in none of its parts undertook to determine what persons should constitute that people. On the other hand, the Constitution, while it did not confer freedom or protect the freedom

of any man, did not only contemplate slavery, but legalized it, and, for limited purposes, nationalized it, by that provision of the Constitution which says that any person,—not any black person,—held to service and labor under the laws of one State escaping into another State should not be free by the laws of that State, but might be taken by the authority of his master and returned to his service.

The freedom of the American citizens under the old Constitution was left within the control of the several States; and under the distribution of governmental powers made by the Constitution, the right to determine who should be slave and who should be free was left to the States. The right to protect the freedom of any individual was vested solely in the States. Slavery, in point of fact, came to be confined to the negro race. There is no reason, so far as the national Constitution is concerned, why it should not have extended to the yellow race, the brown race, or even the white race. Indeed, your Honors, it was brought to your attention in the Clyatt case, that ever since the acquisition of territory from Mexico in 1848, there had been slavery in the Territories of New Mexico and Arizona, and there was no constitutional provision prohibiting it. Still further, in our earlier history white men were either in slavery or in a condition which we should describe as involuntary servitude. Keeping clearly in view that under the distribution of governmental powers made by the original Constitution, the freedom of any man was not determined by the national

Constitution and could not be protected by the national law, but, on the other hand, was determined by the will of the people of the several States and protected only by the laws of those States, it is now my purpose to consider what effect upon that situation the thirteenth amendment to the Constitution had. It worked a profound change. It took the whole subject of freedom out of the custody and control of the several States and placed it in the keeping of the nation. It gave to the nation the same power to guard, protect and defend the freedom of all the people of the United States, as, for instance, it had to guard, protect and defend commerce among the States. In both cases the power is plenary. From the time of the thirteenth amendment any man who deprived another of his freedom as distinguished from his liberty became subject to the national power either in restraint or in punishment of his action.

Mr. Justice WHITE. Do you draw a distinction between freedom and liberty—you state freedom as distinguished from liberty?

The ATTORNEY-GENERAL. I will try to make it clear.

Mr. Justice WHITE. Would not "false imprisonment" be a violation of a man's freedom?

The ATTORNEY-GENERAL. "False imprisonment" is a violation of a man's liberty.

Mr. Justice WHITE. Why not "freedom?"

The ATTORNEY-GENERAL. Placing anyone in custody results in depriving him of his liberty, and the same thing directed against him because of his race——

Mr. Justice WHITE. You think it is not depriving him of his liberty unless it is on account of his race?

The ATTORNEY-GENERAL. Yes, sir.

Mr. Justice WHITE. If that be so, how does that comport with the proposition that the Thirteenth Amendment has taken control of the liberty or freedom of all the people of the United States, irrespective of race?

The ATTORNEY-GENERAL. If your honor will permit me I will argue that question by and by.

Mr. Justice BROWN. Does not liberty refer to a temporary deprivation of a man's action, and the word "freedom" to a permanent status?

The ATTORNEY-GENERAL. I think that is at least one distinction between the words.

The thirteenth amendment did not confer equality of rights; it did not confer the equal protection of the laws; it did not confer due process of law. So far as those subjects came to be of national concern, they received only the qualified protection which was bestowed upon them by the fourteenth amendment. The thirteenth amendment, moreover, did not confer political rights or equality of political rights. So far as those subjects came to be of national concern, they received only the qualified protection of the fifteenth amendment. It did not confer social privileges, which are not rights in any proper sense at all. Those were left to be regulated by the instincts, customs, preferences, and even prejudices of the people. The Constitution wisely put social privileges out of view. But

it affirmatively established freedom from slavery or involuntary servitude, and for the first time in our history as a nation it gave to Congress the right to protect that freedom from slavery and involuntary servitude by appropriate legislation.

What does it mean to be free? It means to be wholly free. A man has not, therefore, his full constitutional right unless he is wholly a free man—unless he is not in any sense in involuntary servitude. He has a right under this amendment not to be a slave or to be in servitude in any respect whatever. Congress has the power to pr him in that right. He need not wait until he has sunk in hopeless slavery. He need not see one right after another taken away from him, but may claim his freedom at the threshold and appeal to the power of the nation to protect him. Whenever in any respect he is denied the right of a free man his constitutional right is infringed and Congress may protect against the infringement. Thus has arisen the well-settled doctrine of this court that Congress may protect the people against what are sometimes called "badges," sometimes "incidents," sometimes "essential characteristics" of slavery or servitude. I think there is no doctrine better settled by this court than that the Congress has the authority to protect all the people of the United States against "badges" or "incidents" or "essential characteristics" of slavery or servitude, the language which Mr. Justice Bradley used, in announcing that doctrine in the Civil Rights Case, which has recently received the approval of the unanimous court.

Is, then, a denial of the right to labor on account of race an incident of slavery, a badge of slavery, an essential characteristic of slavery?

I answer, yes. I concede that if a man is denied the right to labor by the act of another directed against him on account of any personal hostility or ill will, or is denied the right to labor by the incidental or even necessary result of an ordinary crime—as false imprisonment—he is not denied a right under the Constitution of the United States. There must be something more. The motive for the denial must be something different than the personal hostility or ill will—than the mere motive which controls the offender in the commission of what Mr. Justice Bradley calls the "ordinary crime." It is not an unusual thing in the law for an act characterized by one intent, or inspired with one motive, to constitute one crime, or perhaps to constitute no crime, and the same visible external act inspired by another motive, characterized by another intent, to constitute an entirely different crime. The arrest of a person by any right-minded citizen because of his becoming suddenly insane, because he was a menace to himself, is perfectly legitimate. If you arrest him through personal hostility or ill will, it is false imprisonment. Breaking a window or door of a house in the night time and entering it for the purpose of extinguishing a fire, is innocent. Breaking through the same door or through the same window with the intent to commit larceny in the house, is burglary. There is no difference in the physical external features of the

act. The offense consists in the motive and intent with which it is done.

Mr. Justice BREWER. You think the concerted action of individuals denying the right of another to labor is putting him in a condition of slavery?

The ATTORNEY-GENERAL. Concerted action against another person, on account of his race, to deprive him of one of the essential rights of freedom, the right to labor, is a violation of the thirteenth amendment.

Mr. Justice BREWER. One of another race—against any person of another race—wouldn't the action of labor organizations in forbidding any person to labor unless he was a member of their organizations be depriving him of liberty?

The ATTORNEY-GENERAL. There might be different considerations. I prefer not to go beyond the necessity of this case.

Mr. Justice WHITE. Why not—what has the question of race to do with it? I hear the words of your distinction, but they do not make an impression upon me. Why does race enter into the question of involuntary servitude unless you confine the words "involuntary servitude" to the race to which freedom was given by the amendment? Take the case of an Irishman who strikes an Italian in working on the railroad. A body of Irish say, We do not like "Dagos" and will not work with them, and they drive them off; they wouldn't do it if they were Irish.

The ATTORNEY-GENERAL. Yes, sir.

Mr. Justice WHITE. The Irishman goes into a bar

room and he sees an Italian there and knocks him down. Would that be a violation under your theory?

The ATTORNEY-GENERAL. I wouldn't go that far.

Mr. Justice BROWN. Does not your position involve the overruling of the case of *United States* v. *Harris* (106 U. S., 629), in which section 5519 was held to be unconstitutional because it was broader than the thirteenth amendment?

The ATTORNEY-GENERAL. The case of the *United States* v. *Harris* was this: A man was arrested for a violation of a State law and was in custody of the State officers. By concerted action he was taken out of their custody and violence inflicted upon him. The question there was whether a constitutional law had been passed which would allow the punishment of people who had denied to another the equal protection, not of the law of the nation, but the equal protection of the law of the State. There were some illustrations used by the justice who delivered the opinion that went beyond the necessity of that case.

Mr. Justice BROWN. That was the thirteenth amendment?

The ATTORNEY-GENERAL. That case was based upon section 5519 of the Revised Statutes, which punishes a conspiracy to deprive any person of the equal protection of the laws of the State. To the claim that the section was authorized by the fourteenth amendment, the court replied that it could not be, for the reason that it was not corrective of State action but operated directly and primarily upon individuals. To

the claim that the section was authorized by the thirteenth amendment, the court replied that the statute was broader than the thirteenth amendment, and for these two reasons the court held the statute unconstitutional. The statute in this case is clearly constitutional, and the only question is, whether the case is brought within the terms of the statute.

Mr. Justice BREWER. The language of the thirteenth amendment is slavery or involuntary servitude.

The ATTORNEY-GENERAL. Yes, sir.

Mr. Justice BREWER. Now, is it not an essential element of slavery that there should be a master to whom the involuntary service is rendered directly?

The ATTORNEY-GENERAL. Slavery, and perhaps involuntary servitude, includes the idea of a master or masters to whom the person in slavery or involuntary servitude is compelled to render obedience. But I am relying here upon the well-settled doctrine, stated clearly in the Civil Rights Cases to which I shall hereafter refer, in language which, in part, was quoted and approved in the recent Clyatt case, that "badges," or "incidents," or "essential characteristics" of slavery or involuntary servitude are forbidden by the Thirteenth Amendment equally with slavery or involuntary servitude themselves

Mr. Justice WHITE. I see that in view of the great disaster at San Francisco the white people having a prejudice against the Chinese race are declining to sell property to Chinamen because they are Chinamen, with the hope that they will be driven out of San Francisco.

Is not the right to buy property the right of a free man?

The ATTORNEY-GENERAL. The right to buy property from a person who is willing to sell property is a right guaranteed by the thirteenth amendment, but the right to buy property from an owner of property who does not wish to sell it is not in any proper sense a right at all.

Mr. Justice DAY. This amendment everybody supposed was intended to protect the colored race. Other races were never thought of at all.

The ATTORNEY-GENERAL. I can easily rest this case upon the fact that the persons injured were of the colored race, and therefore peculiarly within the protection of the thirteenth amendment. But I have not been able to satisfy my mind that this amendment makes a permanent distinction between negroes and persons of other races. Its benefits extend to all persons of all races.

Mr. Justice DAY. The indictment charges that the offense was committed because they were colored.

The ATTORNEY-GENERAL. I can find no lodgment in my mind for the thought that a mob which deprives a negro of the right to labor because of his race has violated this amendment, while another mob which deprives an Italian of the right to labor on account of his race has not.

Mr. Justice DAY. That case is not here.

The ATTORNEY-GENERAL. No.

Mr. Justice DAY. This charge is that it was done because they were of the African race.

THE ATTORNEY-GENERAL. Section 5508, upon which this indictment is based, is a statute which punishes the deprivation of any right secured by the Constitution or laws of the United States, and the court has held that statute constitutional. The question is whether the right in question here was a right guaranteed by the Constitution of the United States.

Mr. Justice DAY. Assuming that, under that amendment which declared all negroes free, there is a power inherent to protect that freedom by protecting the right to work as an incident—then you come to the statute, the right and privilege secured by the Constitution of the United States. Now, is it your proposition that is secured without further legislation?

The ATTORNEY-GENERAL. I think that is perfectly clear under the decisions, if it is a constitutional right.

Mr. Justice DAY. Section 5510 imposes a penalty upon every person who, under the color of any State law, deprives another of a right, privilege, or immunity secured or protected by the Constitution and laws of the United States. Do you claim that a person can be punished under this section unless he acts under the color of the law of the State of Arkansas; or do you claim that there is any law of Arkansas authorizing such conduct?

The ATTORNEY-GENERAL. No, sir; I do not claim either.

Mr. Justice DAY. This section makes it a criminal offense for a person to deprive another of a constitutional right only in case the deprivation is under color

of the State law. Do you make the distinction between the action of a single offender and the concerted action of several offenders? I ask the question so as to clear my own mind on the subject.

The ATTORNEY-GENERAL. I think I understand your Honor's question, and I proceed to answer it as the answer lies in my mind. If a right is secured to any person by the Constitution of the United States, the Congress has power to punish any person or persons who may deprive him of that constitutional right. The Congress clearly has the power to do that, whether the deprivation is under color of State law or not. The Congress, however, has not chosen to exercise its full power for reasons which are easily understood. The Congress by section 5508 makes punishable concerted action of individuals to deprive another of a constitutional right; but by section 5510 a single individual is punishable for such a deprivation of a constitutional right only when the act of deprivation is done under color of a State law. Concerted action is always more dangerous than the solitary action of one individual, and Congress might well make a distinction between the two cases, as it has done.

Mr. Justice DAY. Is there anything in section 5508 which is specifically directed to this particular right in question here?

The ATTORNEY-GENERAL. No, sir; there is not. This section punishes a conspiracy to deprive another of any right secured by the Constitution and laws of the United States. It has been repeatedly held that this

section is constitutional, and it has been held as well that the deprivation of a constitutional right may be punished under it, even though the right may not be specifically set forth in any provision of the law or of the Constitution. The case of *Logan* v. *United States* (144 U. S., 263) was a case of this kind. There it was held that a person while in the custody of the officers of the United States under a charge of crime had a right secured by the Constitution and laws of the United States to protection from violence. That right of protection was not conferred specifically by any provision of the Constitution or of the laws, but grew out of the nature of the Government and its power to arrest offenders and hold them in custody for trial. In that case the concerted action by which the prisoner was taken from his lawful custody and violence inflicted upon him was held to be punishable under this section of the statutes, because he had been deprived of a right secured by the Constitution and laws of the United States, although it was not specifically secured by any specific section of either.

Again, in *Ex parte Yarbrough* (110 U. S., 651), the court held that the right to vote at a Federal election was not conferred upon any person by any particular section of the Constitution or of the statutes. It is a right that grows out of the nature of our free government. Who shall vote, or who shall not vote, is determined by the action of the States. The State having once determined who shall vote and who shall not vote, a man once having become a voter by the

determination of the State has a right to vote secured by the Constitution and laws of the United States, although there is not a specific part of the Constitution or a specific section of the laws which confers that right. And the court held that where people by concerted action and force deprived a person of that right, it was a violation of this very section of the statutes, because the right which was there in question was a right secured to him by the Constitution and laws of the United States.

Mr. Justice DAY. The contention is that when a combination of men deprives another of a right secured by the Constitution, they may be punished under this section, although a single offender may not.

The ATTORNEY-GENERAL. My contention, of course, would be that the same authority which Congress has to punish the concerted action to deprive another of his right secured by the Constitution, it has, but as yet has not exercised, to punish an individual who deprives another of a right secured to him by the Constitution. And because Congress has punished only concerted action, it does not follow that Congress thinks it has the right to punish only concerted action. It has simply punished concerted action and left unpunished the action of the individual unless it is under color of a State law.

Let me illustrate from the Logan case: There the court, as I have said, held that persons who entered into a conspiracy to take the prisoner from the custody of the officers of the United States and inflict violence

upon him were punishable under this statue. But if a single individual should, alone and unaided, do the same thing—although he would equally violate a right secured by the Constitution and the laws of the United States—there is no Federal statute which would reach him. Congress might enact such a statute, but it has not done so. In the case of the individual, his misconduct could only be punished in the State courts because the laws of the United States impose no penalty upon him.

For instance, suppose we have one man in Massachusetts under arrest by the marshal and another man in Ohio under the same arrest. If in Ohio a single man takes away the prisoner from the custody of the marshal and lynches him, no statute of the United States has yet been enacted by which that man can be punished; he must be left to his punishment by the laws of Ohio. If, in the other case, in Massachusetts, two or more men do precisely the same thing, they are punishable, according to the decision of *Logan* v. *The United States*, under this section. I say there is no law which punishes the individual action of one person in depriving another of a right secured by the Constitution or laws of the United States. I say, in the second place, that a right may be secured to the citizen by the Constitution and laws of the United States although there can be found not a single line in either specifically defining the right.

Mr. Justice Day. Your argument is that section 5508 has not gone farther than concerted action?

The ATTORNEY-GENERAL. Yes, sir.

I have contended that there is a valid distinction between the denial to a person of the right to labor by forcible action, which is inspired by motives of personal hostility or ill will, or which results incidentally or necessarily from the commission of an ordinary crime, and the same denial of the right to labor which is inspired by race hostility.

Now, it seems to me that the Government's case rests on that distinction. If it can be maintained at all, it must be maintained by that distinction. I would not for a moment contend that the thirteenth amendment ever gave the nation power to step over into the territory of the States and deal with all the ordinary crimes which may be committed. It has only the power to step over into the territory of a State and deal with a crime which is a crime against freedom, which was authoritatively established by the thirteenth amendment, and for the protection of which authority was affirmatively given to Congress to enact appropriate legislation.

Now, there is little authority upon this proposition, but what authority there is seems to sustain my contention. In the first place we have the contemporaneous interpretation of the thirteenth amendment. The thirteenth amendment was adopted on December 18, 1865, and less than thirty days thereafter Mr. Trumbull, chairman of the Judiciary Committee, introduced Senate bill 61, which afterwards came to be, over the

veto of President Johnson, the first civil rights law. The first section was this:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

That is a declaration not made hastily, but after great deliberation, and after meeting the resistance of a Presidential veto; it was the view of those who had framed the thirteenth amendment that that amendment gave them authority to enact, that every person within the United States should have the right to enforce contracts, to sue and give evidence, to inherit, control, lease, sell, convey, and hold personal property. And the debate in Congress, to which some reference is made in the brief (Brief pp. 11–14), shows very clearly that that law was enacted and that declara-

tion was made because the people who adopted the thirteenth amendment thought that that amendment gave Congress the power to enact that law and make that declaration. It is the contemporaneous interpretation of the thirteenth amendment by the very men who adopted it in Congress.

The next authority to which I invite your honors' attention is the *Cruikshank case* (1 Wood, 308) in the circuit court.

Mr. Justice DAY. Judge Bradley speaks out rather more freely then than he did in the case I have stated.

The ATTORNEY-GENERAL. Yes; he speaks very freely in the Cruikshank case. As I recall it, Mr. Justice Bradley did not deliver the opinion in this court.

Mr. Justice DAY. No; the case came here and the chief justice delivered the opinion—Chief Justice Waite.

The ATTORNEY-GENERAL. I do not claim that anything was decided in the Cruikshank case which is relevant to the case at bar. That was a case charging a number of people with a conspiracy to deprive certain citizens of African descent of the rights that were enumerated in the various counts of the indictment. For one reason or another the Circuit Court held all of those counts bad, and that holding was affirmed when the case reached this court. I refer to the Cruikshank case in the Circuit Court because Mr. Justice Bradley thought it appropriate in that case to discuss the effect of the thirteenth amendment. His words are a deliverance of one of the most learned justices who ever

occupied a seat upon this bench. They partake of the authority which comes from the contemporaneous expounder of the Constitution as well. And relying upon the illustrious character of that justice, relying upon the great part he played in settling the interpretation of the war amendments, relying upon the fact that he was of the generation which adopted those amendments, I feel justified in inviting your honors' attention to some of his utterances in that opinion. Mr. Justice Bradley, on page 319, said:

> It can not be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the thirteenth amendment and the laws thus passed in pursuance thereof.
>
> But this power does not authorize Congress to pass laws for the punishment of ordinary crimes and offenses against persons of the colored race or any other race. That belongs to the State government alone. All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the State courts, unless, indeed, the State should deny to the class of persons referred to the equal protection of the laws. Then, of course, Congress could provide remedies for their security and protection. But in ordinary cases where the laws of the State are not obnoxious to the provisions of the amendment, the duty of Congress in the creation and punishment of offenses is limited to those offenses which aim

at the deprivation of the colored citizen's enjoyment and exercise of his rights of citizenship and of equal protection of the laws because of his race, color, or previous condition of servitude.

To illustrate: If in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the amendment, should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it can not be doubted that this would be a case within the power of Congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race. But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred, or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the State laws only.

To constitute an offense, therefore, of which Congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the State and its courts.

Justice Bradley there makes the clear distinction between the crime which is inspired by the ordinary motives of malice and ill-will, and the crime which is inspired by racial hatred. The former case, he says, lies with the State courts, and the latter case, he says, lies with the courts of the United States. If that utterance of that distinguished jurist is a correct interpretation of the law and a correct interpretation of the Constitution, then the Government's case here is maintained.

Mr. Justice HOLMES. I quite agree if that language be adopted; it is all right as far as section 5508 goes, but your second proposition, as I understood it, is that section 1977 was a valid exercise of its power by Congress to confer rights under the thirteenth amendment.

The ATTORNEY-GENERAL. I did not cite section 1977 as the law under which this prosecution was based. I only cited it as a contemporaneous interpretation by the men who framed the amendment, of that which they thought they had the power to do.

Mr. Justice HOLMES. I have not yet got it quite through my mind whether you are ultimately coming to the proposition that this indictment stands on section 1977 and must stand on it, and that section 1977 can be maintained. Very likely I have failed to appreciate the full scope of what you were saying. I want to be sure I am following you.

The ATTORNEY-GENERAL. If the case can stand at all, it stands solely upon section 5508 and the Constitution. And let me repeat the argument I have made

This statute, which is constitutional, makes it a penal offense for two or more persons by concerted action to deprive another of any right or privilege secured to him by the Constitution or laws of the United States. It is the Government's contention that the right to work, notwithstanding one's race, is a right secured to every person in our jurisdiction by the Constitution of the United States, and that where, by concerted action, another is deprived on account of his race or, if you please, on account of the fact that he belongs to a race which was once in slavery, of the right to work, which is one of the rights essential to freedom, that concerted action may be punished under section 5508 of the Revised Statutes.

I would ask your honors' indulgence while I read another paragraph from Mr. Justice Bradley's opinion in the Cruikshank case (p. 325):

> The *war of race*, whether it assumes the dimensions of civil strife or domestic violence, whether carried on in a guerrilla or predatory form, or by private combination, or even by private outrage or intimidation, is subject to the jurisdiction of the Government of the United States.

I ask your honors to consider those words from that great judge. "The war of race" is his language. And he continues:

> And when any atrocity is committed which may be assigned to this cause, it may be punished by the laws and in the courts of the United States; but any outrages, atrocities, or conspir-

> acies, whether against the colored race or the white race, which do not flow from this cause, but spring from the ordinary felonious or criminal intent which prompts to such unlawful acts, are not within the jurisdiction of the United States, but within the sole jurisdiction of the States, unless, indeed, the State, by its laws, denies to any particular race equality of rights, in which case the Government of the United States may furnish remedy and redress to the fullest extent and in the most direct manner. Unless this distinction be made, we are driven to one of two extremes—either that Congress can never interfere where the State laws are unobjectionable, however remiss the State authorities may be in executing them, and however much a proscribed race may be oppressed; or that Congress may pass an entire body of municipal law for the protection of person and property within the States, to operate concurrently with the State laws, for the protection and benefit of a particular class of the community. This fundamental principle, I think, applies to both the thirteenth and fifteenth amendments.

Now, it is perfectly clear that Justice Bradley did not, in that language, intend to confine the benefits of the thirteenth amendment to any particular race. It is the *war of races* of which he speaks. And when in the execution of that war of races, whether by the State or by concerted action of individuals, or by private outrage, a man is denied one of the essential rights of freedom on account of his race as a consequence of the war of races—in the opinion of Mr.

Justice Bradley, the offense is within the cognizance of the Federal courts.

Mr. Justice HOLMES. I don't see why you might not pursue your general line of thought and yet not make it so broad. You might say wherever a race hostility against the negro arises or threatens involuntary servitude, that under those circumstances it is within the protection of the laws to which you are referring, and yet a racial hostility or an overt act of a precisely similar character against other races might exist and under those circumstances might not be within them.

The ATTORNEY-GENERAL. It is much the easier argument, but I can not make it because I do not believe——

Mr. Justice HOLMES. I don't see why it is not entirely possible to admit that there might be a race war which would not carry with it a threat of servitude.

The ATTORNEY-GENERAL. There might be a race war which had nothing to do with the essential rights of a free man. It is so much easier for us to understand what a race war means when it is directed against the negro race than it is when it is directed against any other race that one might naturally be led to suppose that there can be no deprivation of the rights of freedom of another race except the negro race.

Let me borrow the illustration of the Indian race of Mr. Justice Bradley. They were in that condition of slavery known as peonage, and were, of course, freed from that condition by the thirteenth amendment. Suppose the white people of the Territories in which peonage existed had declared a war of race against

them; had said to them, "You shall not work; you are an Indian or you are a Mexican; you shall not work on account of your race; you shall not work because you were once a peon;" would there be any distinction between such action directed against the Indian or Mexican and the same action directed against the negro? I submit there is no distinction between the cases.

I submit that Mr. Justice Bradley was right in saying that the Indian could be protected by Congress against an attack upon his freedom. Let me go a step further and illustrate by the racial hostility against the Chinese: They could not be protected under this section of the Revised Statutes because they are not citizens. But they have a constitutional right to be free and to enjoy all the essential elements of freedom. Suppose it should be determined that the Chinese should not have the right to work—determined by a mob raising the war of race against the Chinese that they should not work—not because of dislike to that particular Chinaman or the other particular Chinaman, but that the Chinaman should not work on account of his race. Is not his freedom attacked? He is entitled to the benefit of the thirteenth amendment which protects all persons. When the mob says to them, "You shall not have one of the most essential rights of a free man, the right to work," is it not within the power of the National Government to restrain that or to punish those who attempt to deprive that race of that right?

The other cases are the Civil Rights cases. The

precise question at bar was not before the court in the cases known as the Civil Rights cases. But the course of reasoning in those cases, which received the assent of all the judges, leads, it seems to me, to a conclusion sustaining the Government's position in this case. I therefore ask your honors' attention to the case stated somewhat in detail.

These were four indictments, and one action in which it appeared that various persons of color were denied the privilege of inns, theaters, and a ladies' railroad car, in violation of an act of Congress which expressly forbade the denial of such privileges on account of color. The various denials were not under color of any State statutes. The majority of the court held that this law—the law which forbade the denial of equal privileges in theaters, inns, and railroad cars—was not, in the first place, authorized by the fourteenth amendment, because under that amendment Congress had only power to pass laws corrective of State action; and this law was not of such a character. This part of the case is not important here.

The court was unanimous that mere social privileges were not within the view of the Constitution or of any amendment thereof. The court, I think, was unanimous in the view that any imposition upon any person which was a badge, or incident, or essential characteristic of slavery or involuntary servitude was forbidden by the thirteenth amendment, and that any laws operating directly and primarily upon the people, designed to protect them from such badges, or incidents, or

essential characteristics of slavery or involuntary servitude are, by virtue of the thirteenth amendment, within the constitutional power of Congress.

There was a difference of opinion in the court in that case whether the acts which the defendants had committed were badges or incidents or essential characteristics of slavery or involuntary servitude, the majority of the court holding they were not. The dissenting justice thought on account of the peculiar functions exercised by those who managed inns and theaters and railroad trains that these acts were badges and incidents and essential characteristics of slavery. That difference of opinion is not material here.

But there was no difference of opinion on the principle that Congress, by a law operating directly upon the people, might forbid, under penalty, any of the essential characteristics of slavery.

Your honor (Mr. Justice Brewer) asked me a short time ago why slavery or involuntary servitude did not include within its meaning the authority of a master. It does. But a man is not wholly free upon whom is imposed any of the badges or incidents or essential characteristics of slavery. He has a right to resist his enslavement at the very threshold, and he finds his authority for that right in the decision of every member of this court in the Civil Rights cases, because they all held that Congress had a right to pass laws which shall forbid, under penalty, not only the holding of a person in slavery and involuntary servitude, but the imposition upon him of any of the incidents, characteristics and badges of slavery.

We have in that case a clear definition of what the majority of the court understood to be essential characteristics of slavery—badges and incidents of slavery—and they are contained in the opinion of Mr. Justice Bradley, from which I will read one paragraph (*Civil Rights cases*, 109 U. S., 3, 22):

> The long existence of African slavery in this country gave us very distinct notions of what it was and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the thirteenth amendment before the fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form, and to secure to all citizens of every race and color and without regard to previous servitude those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens.

Speaking of a part of the Civil Rights Act, he says:

> Whether this legislation was fully authorized by the thirteenth amendment alone, without the support which it afterwards received from the fourteenth amendment, after the adoption of which it was reenacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the thirteenth amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

And then he goes on to say later:

> Under the thirteenth amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

That language has received the approval of a unanimous court in the Clyatt case.

In the dissenting opinion, a careful statement of the effect of the opinion of the court is made. I will read from it (p. 35):

> They admit, as I have said, that the thirteenth amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that Congress, by the act of 1866, passed in view of the thirteenth amendment, before the fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens.

Now, if that statement by the dissenting justice is a correct statement of the majority opinion, and I submit that it is, the majority opinion not only sustains the case at bar, but it is sustained upon the broad ground which I took, that there inheres in and belongs to every man of every race everywhere within the jurisdiction of the United States all of the essential rights and privileges of a free man and that the National Government has the right by direct legislation to protect him in the enjoyment of his freedom.

This case was originally submitted upon briefs by the parties. In response to your honors' direction, I

am here to submit my views. Exigencies of the public welfare have little place in a court of justice in the interpretation of the laws and the Constitution. And yet they have some place. They admonish us to search well all the sources of national power.

It is not legally important that in this or any other State the remedy under the State laws is useless, if that be true. That consideration can not control the interpretation of the law and the interpretation of the Constitution. The war of races is no longer a sectional war; it is as bitter in the State of Chase and Giddings as it is in the State of Arkansas. It is the war of races. If the negro who is in our midst can be denied the right to work and must live on the outskirts of civilization, he will become more dangerous than the wild beasts, because he has a higher intelligence than the most intelligent beast. He will become an outcast lurking about the borders and living by depredation.

There is but one refuge from that condition, and that is to put himself back under some chosen master in the condition of slavery itself. If the nation has not the power at the very threshold to say to those who declare against this or other races, that as a race it shall not have one of the most essential rights of a free man, it is powerless indeed. I submit that it has that power. It was given to the nation by the thirteeth amendment, and this case is brought within it.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERMS, 1905-1906.

HODGES *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 14 of October Term, 1905.—Submitted October 19, 1905.—Restored to the docket, for oral argument, November 6, 1905.—Argued April 23, 1906.—Decided May 28, 1906.—Opinion withheld until dissent filed, October 24, 1906.

The Fourteenth and Fifteenth Amendments operate solely on state action and not on individual action. Unless the Thirteenth Amendment vests jurisdiction in the National Government, the remedy for wrongs committed by individuals on persons of African descent is through state action and state tribunals, subject to supervision of this court by writ of error in proper cases.

Notwithstanding the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, the National Government still remains one of enumerated powers, and the Tenth Amendment is not shorn of its vitality.

Slavery and involuntary servitude as denounced by the Thirteenth Amendment mean a condition of enforced compulsory service of one to another; and while the cause inciting that amendment was the emancipation of the colored race, it reaches every race and every individual.

The result of the Amendments to the Constitution adopted after the Civil War was to abolish slavery, and to make the emancipated slaves citizens

and not wards of the Nation over which Congress retained jurisdiction. This decision of the people is binding upon the courts, and they cannot attempt to determine whether it was the wiser course.

The United States court has no jurisdiction under the Thirteenth Amendment or sections 1978, 1979, 5508, 5510, Revised Statutes, of a charge of conspiracy made and carried out in a State to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor.

On October 8, 1903, the grand jury returned into the District Court of the United States for the Eastern District of Arkansas an indictment charging that the defendants, (now plaintiffs in error,) with others, "did knowingly, willfully and unlawfully conspire to oppress, threaten and intimidate Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, citizens of the United States of African descent, in the free exercise and enjoyment of rights and privileges secured to them and each of them by the Constitution and laws of the United States and because of their having exercised the same, to wit: The said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, being then and there persons of African descent and citizens of the United States and of the State of Arkansas, had then and there made and entered into contracts and agreements with James A. Davis and James S. Hodges,[1] persons then and there doing business under the name of Davis & Hodges as copartners, carrying on the business of manufacturers of lumber at White Hall, in said county, the said contracts being for the employment by said firm of the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton as laborers and workmen in and about their said manufacturing establishment, by which contracts the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton were on their part to perform labor and services at

[1] Not the plaintiff in error.

said manufactory and were to receive, on the other hand, for their labor and services, compensation, the same being a right and privilege conferred upon them by the Thirteenth Amendment to the Constitution of the United States and the laws passed in pursuance thereof, and being a right similar to that enjoyed in said State by the white citizens thereof, and while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton were in the enjoyment of said right and privilege the said defendants did knowingly, willfully, and unlawfully conspire as aforesaid to injure, oppress, threaten, and intimidate them in the free exercise and enjoyment of said right and privilege, and because of their having so exercised the same and because they were citizens of African descent, enjoying said right, by then and there notifying the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton that they must abandon said contracts and their said work at said mill and cease to perform any further labor thereat, or receive any further compensation for said labor, and by threatening in case they did not so abandon said work to injure them, and by thereafter then and there willfully and unlawfully marching and moving in a body to and against the place of business of the said firm while the said Berry Winn, Dave Hinton Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton were engaged thereat and while they were in the performance of said contracts thereon, the said defendants being then and there armed with deadly weapons, threatening and intimidating the said workmen there employed, with the purpose of compelling them by violence and threats and otherwise to remove from said place of business, to stop said work and to cease the enjoyment of said right and privilege, and by then and there willfully, deliberately, and unlawfully compelling said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton to quit said work and

abandon said place and cease the free enjoyment of all advantages under said contracts, the same being so done by said defendants and each of them for the purpose of driving the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall, and George Shelton from said place of business and from their labor because they were colored men and citizens of African descent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

A demurrer to this indictment, on the ground that the offense created by sections 1977 and 5508, Rev. Stat., under which it was found, was not within the jurisdiction of the courts of the United States, but was judicially cognizable by state tribunals only, was overruled, a trial had, and the three plaintiffs in error found guilty, sentenced separately to imprisonment for different terms and to fine, and to be thereafter ineligible to any office of profit or trust created by the Constitution or laws of the United States. Sections 1977, 1978, 1979, 5508 and 5510 read as follows:

"SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

"SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

"SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

"SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both."

There being constitutional questions involved, the judgment was brought directly to this court on writ of error.

Mr. James P. Clarke, Mr. L. C. Going and *Mr. J. F. Gautney*, for plaintiffs in error, submitted:

Plaintiffs in error demurred and contended below and contend here that—

The matters, things and allegations therein contained do not constitute a public offense against the laws of the United States; section 1977 of the Revised Statutes of the United

States, upon which the indictment is founded, is unconstitutional; section 1977 of the Revised Statutes, when taken and construed with section 5508 of the same, in so far as it creates offenses and imposes penalties, is in violation of the Constitution; the offenses created by the said sections are not within the jurisdiction of the United States, and are cognizable before state tribunals only.

The court below overruled the demurrer and sustained the position of the Government on the ground that the right enjoyed by the African citizens set out in the indictment was a right secured to them under the Constitution and the laws of the United States. But see where in *United States* v. *Cruikshank*, 92 U. S. 542, this court held all rights are not so granted or secured. Whether one is so or not is a question of law to be determined by the court, not the prosecutor.

This case is resolved into a simple question: Is the right to contract one guaranteed or secured by the Constitution or laws of the United States? Or, is the right of a citizen of African descent to make or enforce a contract a right granted or secured to him by the Constitution or laws of the United States?

The court below failed to recognize the distinction between rights declared and recognized, but not granted or secured by the Constitution and laws. Such a distinction exists and has been noticed by this court. *Logan* v. *United States*, 144 U. S. 263, 286.

Citizenship under the laws of the various States of this Union is not essential to the right to contract. Aliens are permitted to contract, and to have and enforce the same rights in reference thereto as citizens. The right to contract existed long prior to the Declaration of Independence, or the adoption of the Constitution of the United States. The Thirteenth Amendment did nothing more than to create or make a freeman of a slave. Since he became a freeman the municipal laws of the land give to him the right to contract, to sue and be sued in the State or municipality in which he resides.

The right to pursue or follow any of the ordinary vocations of life are not created by the Constitution or laws of the United States, but are among the inherent and inalienable rights of man, and are, therefore, not dependent for their existence upon the Constitution. *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 746; *Civil Rights Cases*, 109 U. S. 3, 13.

Admitting the facts alleged in the indictment to be true, it does not follow that the conspiracy upon a part of certain individuals to intimidate or interfere with a Negro citizen in the performance of his contract fastens upon the Negro any badge of slavery any more than it would be held to fasten a badge of slavery upon a white man if his right to contract should be interfered with by intimidations or threats.

The most that can be said of the acts alleged in the indictment is that they are a violation or in violation of the criminal laws of the State of Arkansas. The Thirteenth Amendment has respect not to distinction of race or class or color, but to slavery.

The Constitution prohibits a State from passing a law impairing the obligation of a contract. This did not give Congress power to provide laws for general enforcement of contracts, nor power to invest the courts of the United States with power over contracts so as to enable parties to sue upon them in these courts. *Civil Rights Cases*, 109 U. S. 3.

Examples of some of the rights guaranteed or secured by the Constitution and laws of the United States are those such as patents, trade-marks, right to homestead public lands, to vote in Federal elections, etc. *United States* v. *Waddell*, 112 U. S. 76.

But a conspiracy to intimidate and compel officers of a mining company to discharge their employés, or to compel the employés to leave the service of the company, is not an offense against the laws of the United States. *Petibone* v. *United States*, 149 U. S. 202.

The Emancipation Proclamation by removing the disability of slavery made the Negro a citizen and placed him upon

the same plane before the law as the white race. *United States* v. *Rhodes*, 1 Abb. (U. S.) 28; 1 Kent Com., 298 and note; *State* v. *Manuel*, 4 Dev. & Batt. (N. C.) 28.

In the last-mentioned authority will be found an unanswerable argument upon that proposition. In discussing the question of a free Negro, Judge Gaston, speaking for the court, said: "Under the laws of this State, all human beings within it who are not slaves fall within one of two classes, aliens or citizens. Slaves manumitted here become free men, and all free persons born within the State are citizens."

This case was cited and approved in *State* v. *Newsom*, 5 Ired. (N. C.) 250.

If, on the other hand, the African citizen acquired his rights of life, liberty and pursuit of happiness, which include the right to contract, from the statutes under consideration or the Thirteenth Amendment, he has acquired rights, privileges and protection by virtue of that instrument which the white man, by whom it was made, did not and could not secure to himself.

According to the theory of the Government in this case, when the *color* is changed and the white man becomes the conspirator, and the citizen of African descent the victim, the strong arm of the Government can and will be stretched forth to protect the citizen of African descent. It cannot be possible that the Thirteenth Amendment can give to the Congress of the United States the right to enact a code of municipal laws merely for the purpose of protecting citizens of African descent in their right to contract.

If individuals should undertake to enforce upon citizens of African descent or upon any other persons any form or badge of slavery, it cannot be doubted that this would make a cause of action cognizable in the United States courts.

The *Peonage Cases*, 197 U. S. 207, are all illustrations of the applicability of the laws under discussion. As to the constitutionality of section 5519 of the Revised Statutes, see *United States* v. *Harris*, 106 U. S. 626.

The Attorney General, with whom *Mr. Milton D. Purdy*, Assistant to the Attorney General, and *Mr. Otis J. Carlton*, Special Assistant to the Attorney General, were on the brief for the United States.

The question of law is:

Has a colored citizen of the United States of African descent a right secured to him by the Constitution or laws of the United States to work at any particular occupation or calling—as, for example, in the capacity of a common laborer in the manufacture of lumber—and, therefore, free from injury, oppression, or interference on the part of individual citizens, when the motive for such injury, oppression, or interference arises solely from the fact that such laborer is a colored person of African descent?

This question does not involve the constitutionality of § 5508, Rev. Stat., which is not open to doubt, *Motes* v. *United States*, 178 U. S. 458, but simply whether the phrase "any right or privilege secured to him by the Constitution or laws of the United States," includes the right charged in this indictment as having been secured to the colored citizens who were driven away from work by the unlawful acts of individuals. In view of *United States* v. *Cruikshank*, 92 U. S. 545, and *Logan* v. *United States*, 144 U. S. 263, 293, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens. Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State.

Unless, therefore, the additional element of infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the state laws. In what may be called the old Constitution—the Constitution as it

stood before the war amendments—there were no provisions which could be invoked to support § 1977. Art. IV, section 2, provided: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." If this section were not inapplicable on other grounds, it could not be invoked here, for it is prohibitive only of state action. *Paul* v. *Virginia*, 8 Wall. 168; *Ward* v. *Maryland*, 12 Wall. 418; *Slaughter House Cases*, 16 Wall. 36; *United States* v. *Harris*, 106 U. S. 629, 643; *Blake* v. *McClung*, 172 U. S. 236.

And for a similar reason the power can not be sought in the Fourteenth Amendment. *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Cruikshank*, 92 U. S. 542; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Civil Rights Cases*, 109 U. S. 3; *United States* v. *Harris*, 106 U. S. 629; *James* v. *Bowman*, 190 U. S. 127.

Under the Thirteenth Amendment, however, Congress may enact laws operating primarily upon individuals, *United States* v. *Clyatt*, 197 U. S. 207, and if § 1977 can not be sustained under that Amendment the Government's case must fail. The Thirteenth Amendment was intended to secure to the colored race practical freedom. For its history, and history of the Civil Rights Bill, see Cong. Globe, Vol. 69, pp. 474, 503; speeches of Mr. Howard, Mr. Trumbull, Chairman of the Judiciary Committee, and Mr. Cowan.

And as to the scope of the Amendment and the legislation under it see *Slaughter House Cases*, 16 Wall. 36; *United States* v. *Harris*, 106 U. S. 629, 641; *Clyatt* v. *United States*, 97 U. S. 207.

The Civil Rights Act of 1875, provided that the Negro, equally with the white man, should have accommodation in public places of amusement, hotels, and public conveyances, but this court held in the *Civil Rights Cases*, 109 U. S. 3, that the denial of the *social* rights attempted to be secured by the act of 1875, as distinguished from the *fundamental* rights secured by the act of 1866, did not amount to the imposition of a badge of slavery.

The Thirteenth Amendment has been considered in some

other cases in this court, but an examination of them is not material to the discussion of this case. *Plessy* v. *Ferguson*, 163 U. S. 537; *Robertson* v. *Baldwin*, 165 U. S. 275.

This court has never held that the Thirteenth Amendment was not broad enough to permit of legislation such as is contained in § 1977, Rev. Stat. We have seen, on the contrary, that Mr. Justice Field and Mr. Justice Harlan have given the support of their opinions to the validity of the parent enactment. *Slaughter House Cases*, 16 Wall. 36, 90, 91; *Civil Rights Cases*, 109 U. S. 3, 35.

The validity of the act of April 9, 1866, was sustained in several cases in the lower courts of the United States, and in the state courts. *United States* v. *Rhodes*, 1 Abb. (U. S.) 28; *Matter of Elizabeth Turner*, 1 Abb. (U. S.) 84; *Smith* v. *Moody*, 26 Indiana, 299, 306; *People* v. *Washington*, 36 California, 658; *United States* v. *Cruikshank*, 1 Woods, 308, 319.

The act of 1866, was held to be unconstitutional in a dissenting opinion in *People* v. *Washington*, *supra*, and in *Bowlin* v. *Commonwealth*, 2 Bush (Ky.), 5.

From the above authorities and extracts from speeches in Congress, the Government contends that the people, having clear notions of the status of the colored race and of what attempts would be made to return it to its servile condition, intended by the Thirteenth Amendment to grant and secure practical freedom. It outrages our feelings of humanity to believe that the men who had fought to free the slaves merely intended to sever the legal ligament which bound the slave to his master, leaving the latter at liberty to cut him off from the fundamental rights which white men enjoyed. Such a narrow construction leaves the black race in a state made worse by their emancipation by the breaking of the cord of self-interest which bound the slaveholder to take care of his property. That motive would disappear with the adoption of the Amendment, and the people must have foreseen that the former slaveholders would strive, by individual action and through the reconstructed legislatures

in the late rebellious States, to prevent the freedmen from acquiring property, suing in the courts, giving evidence, and in a great variety of ways endeavor to prevent those whom they regarded as intended by the Almighty to be bondsmen from enjoying the practical rights of freemen.

For this purpose the people used in the Amendment language which this court has said permits Congress to enact legislation operating directly to punish the acts of individuals, not sanctioned by any color of state authority. *Clyatt* v. *United States*, 197 U. S. 207.

The framers of that Amendment were familiar with the provisions of the Constitution, and with that which gave Congress power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

As to what is appropriate legislation, see cases upholding the fugitive slave laws, *Prigg* v. *Pennsylvania*, 16 Pet. 539; *Ableman* v. *Booth*, 21 How. 506. And legislation, like § 1977, which declares that the black and white races shall be upon an equality in the enjoyment of these rights, is apt and appropriate.

The intent of Congress, expressed in sections 1977 and 5508, is to make it an offense for individuals, acting in combination, to injure or oppress the Negro, solely because of his color, in his right to make and enforce contracts.

If rights are granted and secured by constitutional enactments, Congress may legislate to protect those rights against individual action. *United States* v. *Reese*, 92 U. S. 214; *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Waddell*, 112 U. S. 76; *Baldwin* v. *Franks*, 120 U. S. 678; *Logan* v. *United States*, 144 U. S. 263; *Motes* v. *United States*, 178 U. S. 458.

In *Clyatt* v. *United States*, 197 U. S. 207, it was held that

the Thirteenth Amendment, unlike the Fourteenth and Fifteenth, gives Congress authority to enact legislation operating upon individuals, and that the Fourteenth Amendment did not take away from Congress the power to pass legislation operating on individuals.

Scott v. *Sandford*, 19 How. 393, held that slaves were not citizens. The Emancipation Proclamation made them free, and it may be admitted, made them citizens of the United States, but it did not secure to them practical freedom. That was done by the Thirteenth Amendment, and because, under that Amendment Congress may enact legislation acting primarily upon individuals, it may punish those who attempt by concerted action to deprive the Negro of his right to contract solely for the reason that he is a Negro. If a conspiracy should be entered into by blacks to hinder a white man, solely on account of his color, from making and enforcing contracts, Congress could legislate for such a case. That question, however, does not arise in this case.

If there be doubt whether the legislation of Congress, § 1977, Rev. Stat., be constitutional, the doubt should be resolved in favor of its validity according to the rule expressed in *Ogden* v. *Saunders*, 12 Wheat. 213.

The *Civil Rights Cases*, 109 U. S. 3,—and see statement of effect of opinion on p. 35—not only sustains this case, but it is sustained on the broad ground that there inheres in and belongs to every man of every race everywhere within the jurisdiction of the United States, all of the essential rights and privileges of a free man, and that the National Government has the right by direct legislation to protect him in the enjoyment of his freedom.

This case was originally submitted on briefs. By the court's direction, it has also been orally argued by the Government. Exigencies of the public welfare have little place in a court of justice in the interpretation of the laws and the Constitution. And yet they have some place. They admonish us to search well all the sources of National power.

It is not legally important that in this or any other State the remedy under the state laws is useless. If that be true, that consideration can not control the interpretation of the law and the interpretation of the Constitution. The war of races is no longer a sectional war; it is as bitter in the State of Chase and Giddings as it is in the State of Arkansas. If the Negro who is in our midst can be denied the right to work, and must live on the outskirts of civilization, he will become more dangerous than the wild beasts, because he has a higher intelligence than the most intelligent beast. He will become an outcast lurking about the borders and living by depredation.

There is but one refuge from that condition, and that is to put himself back under some chosen master in the condition of slavery itself. If the Nation has not the power at the very threshold to say to those who declare against this or other races, that as a race it shall not have one of the most essential rights of a free man, it is powerless indeed. The Government submits that it has that power. It was given to the Nation by the Thirteenth Amendment, and this case is brought within it.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

While the indictment was founded on sections 1977 and 5508, we have quoted other sections to show the scope of the legislation of Congress on the general question involved.

That prior to the three *post bellum* Amendments to the Constitution the National Government had no jurisdiction over a wrong like that charged in this indictment is conceded; that the Fourteenth and Fifteenth Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the State is complained of. Unless, therefore, the Thirteenth Amendment vests in the Nation the jurisdiction claimed the remedy must be sought through

state action and in state tribunals subject to the supervision of this court by writ of error in proper cases.

In the *Slaughter House Cases*, 16 Wall. 36, 76, in defining the privileges and immunities of citizens of the several States, this is quoted from the opinion of Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. Cir. Ct. 371, 380.

"'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several States which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole.'"

And after referring to other cases this court added (p. 77):

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent Amendments no claim or pretence was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government."

Notwithstanding the adoption of these three Amendments, the National Government still remains one of enumerated powers, and the Tenth Amendment, which reads "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," is not shorn of its vitality. True the Thirteenth Amendment grants certain specified and additional power to Congress, but any Congressional legislation directed against individual action which was not warranted before the Thirteenth Amendment must find authority in it. And in interpreting the scope of that Amendment it is well to bear in mind the words of Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 188, which, though spoken more than four score years ago, are still the rule of construction of constitutional provisions:

"As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

The Thirteenth Amendment reads:

"SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SEC. 2. Congress shall have power to enforce this article by appropriate legislation."

The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a decla-

ration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African. Of this Amendment it was said by Mr. Justice Miller in *Slaughter House Cases*, 16 Wall. 36, 69, "Its two short sections seem hardly to admit of construction." And again: "To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government . . . requires an effort, to say the least of it."

A reference to the definitions in the dictionaries of words whose meaning is so thoroughly understood by all seems an affectation, yet in Webster "slavery" is defined as "the state of entire subjection of one person to the will of another." Even the secondary meaning given recognizes the fact of subjection, as "one who has lost the power of resistance; one who surrenders himself to any power whatever; as a slave to passion, to lust, to strong drink, to ambition," and "servitude" is by the same authority declared to be "the state of voluntary or compulsory subjection to a master."

It is said, however, that one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract they to that extent reduced those parties to a condition of slavery, that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates *pro tanto* to abridge some of the freedom to which the individual is entitled. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from tres-

pass or appropriation, but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery. Indeed, this is conceded by counsel for the Government, for in their brief (after referring to certain decisions of this court) it is said:

"With these decisions, and many others that might be cited, before us, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens."

"Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State.

"Unless, therefore, the additional element, to wit, the infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the state laws."

The logic of this concession points irresistibly to the contention that the Thirteenth Amendment operates only to protect the African race. This is evident from the fact that nowhere in the record does it appear that the parties charged to have been wronged by the defendants had ever been themselves slaves, or were the descendants of slaves. They took no more from the Amendment than any other citizens of the United States. But if, as we have seen, that denounces a condition possible for all races and all individuals, then a like wrong perpetrated by white men upon a Chinese, or by black men upon a white man, or by any men upon any man on account of his race, would come within the jurisdiction of Congress, and that protection of individual rights which prior to the Thirteenth Amendment was unquestionably within the jurisdiction solely of the States, would by virtue of that Amendment be transferred to the Nation, and subject to the legislation of Congress.

But that it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation, consider the legislation in respect to the Chinese. In slave times in the slave States not infrequently every free Negro was required to carry with him a copy of a judicial decree or other evidence of his right to freedom or be subject to arrest. That was one of the incidents or badges of slavery. By the act of May 5, 1892, Congress required all Chinese laborers within the limits of the United States to apply for a certificate, and any one who after one year from the passage of the act should be found within the jurisdiction of the United States without such certificate, might be arrested and deported. In *Fong Yue Ting* v. *United States*, 149 U. S. 698, the validity of the Chinese deportation act was presented, elaborately argued, and fully considered by this court. While there was a division of opinion, yet at no time during the progress of the litigation, and by no individual, counsel, or court connected with it, was it suggested that the requiring of such a certificate was evidence of a condition of slavery or prohibited by the Thirteenth Amendment.

One thing more: At the close of the civil war, when the problem of the emancipated slaves was before the Nation, it might have left them in a condition of alienage, or established them as wards of the Government like the Indian tribes, and thus retained for the Nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. By the Fourteenth Amendment it made citizens of all born within the limits of the United States and subject to its jurisdiction. By the Fifteenth it prohibited any State from denying the right of suffrage on account of race, color or previous condition of servitude, and by the Thirteenth it forbade slavery or involuntary servitude anywhere within the limits of the land. Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to

consider. It is for us to accept the decision, which declined to constitute them wards of the Nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes.

For these reasons we think the United States court had no jurisdiction of the wrong charged in the indictment.

The judgments are reversed, and the case remanded with instructions to sustain the demurrer to the indictment.

MR. JUSTICE BROWN concurs in the judgments.

MR. JUSTICE HARLAN, with whom concurs MR. JUSTICE DAY, dissenting.[1]

The plaintiffs in error were indicted with eleven others in the District Court of the United States, Eastern District of Arkansas, for the crime of having knowingly, wilfully and unlawfully conspired to oppress, threaten and intimidate Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, persons of African descent and citizens of the United States and of Arkansas, in the free exercise and enjoyment of the right and privilege—alleged to be secured to them respectively by the Constitution and laws of the United States—of disposing of their labor and services by contract and of performing the terms of such contract without discrimination against them, because of their race or color, and without illegal interference or by violent means.[2]

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[1] Dissent announced May 28, 1906, but not filed until October 24, 1906.

[2] The indictment charged that "the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, being then and there persons of African descent, and citizens of the United States and of the State of Arkansas, had then and there

The indictment was based primarily upon section 5508 of the Revised Statutes, which provides: " SEC. 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the

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made and entered into contracts and agreements with James A. Davis and James S. Hodges, persons then and there doing business under the name of Davis & Hodges, as copartners carrying on the business of manufacturers of lumber at White Hall, in said county, the said contracts being for the employment by said firm of the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, as laborers and workmen in and about their said manufacturing establishment, by which contracts the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, were on their part to perform labor and services at said manufactory and were to receive on the other hand for their labor and services compensation, the same being a right and privilege conferred upon them by the Thirteenth Amendment to the Constitution of the United States and the laws passed in pursuance thereof, and being a right similar to that enjoyed in said State by the white citizens thereof; and while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, were in the enjoyment of said right and privilege the said defendants did knowingly, wilfully and unlawfully conspire as aforesaid to injure, oppress, threaten and intimidate them in the free exercise and enjoyment of said right and privilege, and because of their having so exercised the same and because they were citizens of African descent enjoying said right, by then and there notifying the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, that they must abandon said contracts and their said work at said mill and cease to perform any further labor thereat, or receive any further compensation for said labor, and by threatening in case they did not so abandon said work to injure them, and by thereafter then and there wilfully and unlawfully marching and moving in a body to and against the places of business of the said firm while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, were engaged thereat and while they were in the performance of said contracts thereon, the said defendants being then and there armed with deadly weapons, threatening and intimidating the said workmen there employed, with the purpose of compelling them by violence and threats, and otherwise to remove from said place of business, to stop said work and to cease the enjoyment of said right and privilege, and by then and there wilfully, deliberately and unlawfully

same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States."

Other sections of the statutes relating to civil rights, and referred to in the discussion at the bar, although not, perhaps, vital to the decision of the present case, are as follows: "SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." "SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." "SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Consti-

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compelling said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, to quit said work and abandon said place and cease the free enjoyment of all advantages under said contracts, the same being so done by said defendants and each of them for the purpose of driving the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, from said place of business and from their labor because they were colored men and citizens of African descent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

tution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." "SEC. 5510. Every person who, under color of any law statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both."

A demurrer to the indictment was overruled, and the defendants having pleaded not guilty, they were tried before a jury, and some of them—the present plaintiffs in error—were convicted of the crime charged, were each fined one hundred dollars and ordered to be imprisoned for one year and a day. A motion for a new trial having been denied, they have brought the case to this court.

In our consideration of the questions now raised it must be taken, upon this record, as conclusively established by the verdict and judgment—

That certain persons—the said Berry Winn and others above named with him—citizens of the United States, and of Arkansas, and of African descent, entered into a contract, whereby they agreed to perform for compensation service and labor in and about the manufacturing business in that State of a private individual;

That those persons, in execution of their contract, entered upon and were actually engaged in performing the work they agreed to do, when the defendants—the present plaintiffs in error—knowingly and wilfully conspired to injure, oppress, threaten and intimidate such laborers, solely because of their having made that contract and *because of their race and color*, in the free exercise of their right to dispose of their labor, and

prevent them from carrying out their contract to render such service and labor;

That, in the prosecution of such conspiracy, the defendants, by violent means, compelled those laborers, simply "*because they were colored men and citizens of African descent*," to quit their work and abandon the place at which they were performing labor in execution of their contract; and,

That, in consequence of those acts of the defendant conspirators, the laborers referred to were hindered and prevented, *solely because of their race and color*, from enjoying the right by contract to dispose of their labor upon such terms and to such persons as to them seemed best.

Was the right or privilege of these laborers thus to dispose of their labor secured to them "by the Constitution or laws of the United States"? If so, then this case is within the very letter of section 5508 of the Revised Statutes, and the judgment should be affirmed if that section be not unconstitutional.

But I need not stop to discuss the constitutionality of section 5508. It is no longer open to question, in this court, that Congress may, by appropriate legislation, protect any right or privilege arising from, created or secured by, or dependent upon, the Constitution or laws of the United States. That is what that section does. It purports to do nothing more. In *Ex parte Yarbrough*, 110 U. S. 651, it was distinctly adjudged that section 5508 was a valid exercise of power by Congress. In *Logan* v. *United States*, 144 U. S. 263, 286, 293, this court stated that the validity of section 5508 had been sustained in the *Yarbrough case*, and, speaking by Mr. Justice Gray, said: "In *United States* v. *Reese*, 92 U. S. 214, 217, decided at October term, 1875, this court, speaking by Chief Justice Waite, said: 'Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be

protected.'" After referring to prior adjudications the court in the *Logan case* also unanimously declared: "The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that *every* right *created by, arising under or dependent upon, the Constitution of the United States* may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

In *Motes* v. *United States*, 178 U. S. 458, 462, the language of the court was: "We have seen that by section 5508, of the Revised Statutes it is made an offense against the United States for two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States—the punishment prescribed being a fine of not more than $5,000, imprisonment not more than ten years, and ineligibility to any office or place of honor, profit or trust created by the Constitution or laws of the United States. And by section 5509 it is provided that if in committing the above offense any other felony or misdemeanor be committed, the offender shall suffer such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed. No question has been made—indeed none could successfully be made—as to the constitutionality of these statutory provisions. *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Waddell*, 112 U. S. 76. Referring to those provisions and to the clause of the Constitution giving Congress authority to pass all laws

necessary and proper for carrying into execution the powers specifically granted to it, and all other powers vested in the Government of the United States, or in any department or officer thereof, this court has said: 'In the exercise of this general power of legislation, Congress may use any means appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and spirit of the Constitution.' *Logan* v. *United States*, 144 U. S. 263, 283."

In view of these decisions it is unnecessary to examine the grounds upon which the constitutionality of section 5508 rests; and I may assume that the power of the National Government, by appropriate legislation, to protect a right created by, derived from or dependent in any degree upon, the Constitution of the United States cannot be disputed.

I come now to the main question—whether a conspiracy or combination to forcibly prevent citizens of African descent, *solely because of their race and color*, from disposing of their labor by contract upon such terms as they deem proper and from carrying out such contract, infringes or violates a right or privilege created by, derived from or dependent upon the Constitution of the United States.

Before the Thirteenth Amendment was adopted the existence of freedom or slavery within any State depended wholly upon the constitution and laws of such State. However abhorrent to many was the thought that human beings of African descent were held as slaves and chattels, no remedy for that state of things as it existed in some of the States could be given by the United States in virtue of any power it possessed prior to the adoption of the Thirteenth Amendment. That condition, however, underwent a radical change when that Amendment became a part of the supreme law of the land and as such binding upon all the States and all the people, as well as upon every branch of government, Federal and state. By the Amendment it was ordained that "neither slavery nor involuntary servitude, except as a punishment for

crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction"; and "Congress shall have power to enforce this article by appropriate legislation." Although in words and form prohibitive, yet, in law, by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom. It also conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for crime) the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom. It went further, however, and, by its second section, invested Congress with power, by appropriate legislation, to enforce its provisions. To that end, by direct, primary legislation, Congress may not only prevent the rëestablishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges should exist or be enforced in any State or Territory of the United States. It therefore became competent for Congress, under the Thirteenth Amendment, to make the establishing of slavery, as well as all attempts, whether in the form of a conspiracy or otherwise, to subject anyone to the badges or incidents of slavery *offenses against the United States*, punishable by fine or imprisonment, or both. And legislation of that character would certainly be appropriate for the protection of whatever rights were given or created by the Amendment. So, legislation making it an offense against the United States to conspire to injure or intimidate a citizen in the free exercise of any right secured by the Constitution is broad enough to embrace a conspiracy of the kind charged in the present indictment. "A right or immunity, whether created by the Constitution or only guaranteed by it, may be protected by Congress." This court so adjudged in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, as it had previously adjudged in *Prigg* v. *Pennsylvania*, 16 Pet. 539, and in *United States* v. *Reese*, 92 U. S. 214. The colored laborers against whom the conspiracy in question was directed

owe their freedom as well as their exemption from the incidents and badges of slavery alone to the Constitution of the United States. Yet it is said that their right to enjoy freedom and to be protected against the badges and incidents of slavery is not secured by the Constitution or laws of the United States.

It may be also observed that the freedom created and established by the Thirteenth Amendment was further protected against assault when the Fourteenth Amendment became a part of the supreme law of the land; for that Amendment provided that no State shall deprive any person of life, liberty or property, without due process of law. To deprive any person of a privilege inhering in the freedom ordained and established by the Thirteenth Amendment is to deprive him of a privilege inhering in the liberty recognized by the Fourteenth Amendment. It is true that the present case is not one of deprivation by the constitution or laws of the *State* of the privilege of disposing of one's labor as he deems proper. But it is one of a combination and conspiracy by individuals acting in hostility to rights conferred by the Amendment that ordained and established freedom and conferred upon every person within the jurisdiction of the United States (not held lawfully in custody for crime) the privileges that are fundamental in a state of freedom, and which were violently taken from the laborers in question solely because of their race and color.

Let us see whether these principles do not find abundant support in adjudged cases.

One of the earliest cases arising under the Thirteenth Amendment was that of *United States* v. *Cruikshank, &c.*, 1 Woods, 308, 318, 320. It became necessary in that case for Mr. Justice Bradley, holding the Circuit Court, to consider the scope and effect of the Thirteenth Amendment and the extent of the power of Congress to enforce its provisions. Referring to the Thirteenth Amendment, that eminent jurist said that "this is not merely a prohibition against the passage

or enforcement of any law inflicting or establishing slavery or involuntary servitude, but it is a positive declaration that *slavery shall not exist*. . . . So, undoubtedly, by the Thirteenth Amendment, Congress has power to legislate for the entire eradication of slavery in the United States. This Amendment had an affirmative operation the moment it was adopted. It enfranchised four millions of slaves, if, indeed, they had not previously been enfranchised by the operation of the civil war. Congress, therefore, acquired the power not only to legislate for the eradication of slavery, but the power to give full effect to this bestowment of liberty on these millions of people. All this it essayed to do by the Civil Rights Bill, passed April 9, 1866, 14 Stat. 27, by which it was declared that all persons born in the United States, and not subject to a foreign power (except Indians, not taxed), should be citizens of the United States; and that such citizens, of every race and color, without any regard to any previous condition of slavery or involuntary servitude, should have *the same right* in every State and Territory *to make and enforce contracts*, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and should be subject to like punishment, pains, and penalties, and to none other, any law, etc., to the contrary notwithstanding. It was supposed that the eradication of slavery and involuntary servitude of every form and description required that the slave should be made a citizen and placed on an entire equality before the law with the white citizen, and, therefore, that Congress had the power, under the Amendment, to declare and effectuate these objects. . . . Conceding this to be true (which I think it is), Congress then had the right to go further and to enforce its declaration by passing laws *for the prosecution and punishment of those who should deprive, or attempt to deprive, any person of the rights thus conferred upon them*. Without having this power,

Congress could not enforce the Amendment. *It cannot be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the Thirteenth Amendment and the laws thus passed in pursuance thereof.* But this power does not authorize Congress to pass laws for punishment of ordinary crimes and offenses against persons of the colored race or any other race. That belongs to the state government alone. All ordinary murders, robberies, assaults, thefts and offenses whatsoever are cognizable only in the state courts, unless, indeed, the State should deny to the class of persons referred to equal protection of the laws. . . . To illustrate: If in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the Amendment, should propose to lease and cultivate a farm, *and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of Congress to remedy and redress.* It would be a case of interference with the person's exercise of his equal rights as a citizen *because of his race.* But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the state laws only."

This was followed by the *Civil Rights Cases*, 109 U. S. 3, 20, 22, in which the court passed upon the constitutionality of an act of Congress providing for the full and equal enjoyment by every race, equally, of the accommodations, advantages and facilities of theatres and public conveyances, and other places of public amusement; and in which the court also considered the scope and effect of the Thirteenth Amendment. In that case the court, speaking by Mr. Justice Brad-

ley—who, as we have seen, delivered the judgment in the case just cited—said: "*By its own unaided force and effect* it abolished slavery, and *established universal freedom*. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation *may be primary and direct in its character; for the Amendment is not a mere prohibition of state laws* establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law; and, therefore, the Thirteenth Amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation clothes Congress with power to pass all laws *necessary and proper for abolishing all badges and incidents of slavery in the United States*. . . . The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, *to make contracts*, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, *were the inseparable incidents of the institution*. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. . . . We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and

from denying to any the equal protection of the laws. The Amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment it has only to do with slavery and its incidents. Under the Fourteenth Amendment it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate *all forms and incidents of slavery* and involuntary servitude, *may be direct and primary*, operating upon the acts of *individuals, whether sanctioned by state legislation or not;* under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings."

I participated in the decision of the *Civil Rights Cases*, but was not able to concur with my brethren in holding the act there involved to be beyond the power of Congress. But I stood with the court in the declaration that the Thirteenth Amendment not only established and decreed universal civil and political freedom throughout this land, but abolished the incidents or badges of slavery, among which, as the court declared, was the disability, based merely on race discrimination, to hold property, to make contracts, to have a standing in court, and to be a witness against a white person.

One of the important aspects in the present discussion of the *Civil Rights Cases*, is that the court there proceeded distinctly upon the ground that although the constitution and statutes of a State may not be repugnant to the Thirteenth Amendment, nevertheless, Congress, by legislation of a direct and primary character, may, in order to enforce the Amendment, reach and punish individuals whose acts are in hos-

tility to rights and privileges derived from or secured by or dependent upon that Amendment.

These views were explicitly referred to and reaffirmed in the recent case of *Clyatt* v. *United States*, 197 U. S. 207. That was an indictment against a single individual for having unlawfully and knowingly returned, forcibly and against their will, two persons from Florida to Georgia, to be held in the latter State in a condition of peonage, in violation of the statutes of the United States, (Rev. Stat. 1900, 5526). A person arbitrarily or forcibly held against his will for the purpose of compelling him to render personal services in discharge of a debt, is in a condition of peonage. It was not claimed in that case that peonage was sanctioned by or could be maintained under the constitution or laws either of Florida or Georgia. The argument there on behalf of the accused was, in part, that the Thirteenth Amendment was directed solely against the States and their laws, and that its provisions could not be made applicable to individuals whose illegal conduct was not authorized, permitted or sanctioned by some act, resolution, order, regulation or usage of the State. That argument was rejected by every member of this court, and we all agreed that Congress had power, under the Thirteenth Amendment, not only to forbid the existence of peonage, but to make it an offense against the United States for any *person* to hold, arrest, return or cause to be held, arrested or returned, or who in any manner aided in the arrest or return of another person, to a condition of peonage. After quoting the above sentences from the opinion in the *Civil Rights Cases*, Mr. Justice Brewer, speaking for the court, said (p. 218): "Other authorities to the same effect might be cited. It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or involuntary servitude, except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds another in that condition of involuntary servitude.

This legislation is not limited to the Territories or other parts of the strictly National domain, but is operative in the States and wherever the sovereignty of the United States extends. We entertain no doubt of the validity of this legislation, or *its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding. It operates directly on every citizen of the republic, wherever his residence may be.*" The *Clyatt case* proceeded upon the ground that, although the Constitution and laws of the State might be in perfect harmony with the Thirteenth Amendment, yet the compulsory holding of one individual by another individual for the purpose of compelling the former by personal service to discharge his indebtedness to the latter created a condition of involuntary servitude or peonage, was in derogation of the freedom established by that Amendment, and, therefore, could be reached and punished by the Nation. Is it consistent with the principle upon which that case rests to say that an organized body of individuals who forcibly prevent free citizens, solely because of their race, from making a living in a legitimate way, do not infringe any right secured by the National Constitution, and may not be reached or punished by the Nation? One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage. In each case his will is enslaved, because illegally subjected, by a combination that he cannot resist, to the will of others in respect of matters which a freeman is entitled to control in such way as to him seems best. It would seem impossible, under former decisions, to sustain the view that a combination or conspiracy of individuals, albeit acting without the sanction of the State, may not be reached and punished by the United States, if the combination and conspiracy has for its object, by force, to prevent or burden the free exercise or enjoyment

of a right or privilege created or secured by the Constitution or laws of the United States.

The only way in which the present case can be taken out of section 5508 is to hold that a combination or conspiracy of individuals to prevent citizens of African descent, because of their race, from freely disposing of their labor by contract, does not infringe or violate any right or privilege secured by the Constitution or laws of the United States. But such a proposition, I submit, is inadmissible, if regard be had to former decisions. As we have seen, this court has held that the Thirteenth Amendment, by its own force, without the aid of legislation, not only conferred freedom upon every person (not legally held in custody for crime) within the jurisdiction of the United States, but the right and privilege of being free from the badges or incidents of slavery. And it has declared that one of the insuperable incidents of slavery, as it existed at the time of the adoption of the Thirteenth Amendment, was the disability of those in slavery to make contracts. It has also adjudged—no member of this court holding to the contrary—that any attempt to subject citizens to the incidents or badges of slavery could be made an offense against the United States. If the Thirteenth Amendment established freedom, and conferred, without the aid of legislation, the right to be free from the badges and incidents of slavery, and if the disability to make or enforce contracts for one's personal services was a badge of slavery, as it existed when the Thirteenth Amendment was adopted, how is it possible to say that the combination or conspiracy charged in the present indictment, and conclusively established by the verdict and judgment, was not in hostility to rights secured by the Constitution?

I have already said that the liberty protected by the Fourteenth Amendment against state action inconsistent with due process of law is neither more nor less than the freedom established by the Thirteenth Amendment. This, I think, cannot be doubted. In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589,

we said that such liberty "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment *of all his faculties; to be free to use them in all lawful ways; to live and work when he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to the carrying out to a successful conclusion the purposes above mentioned.*" All these rights, as this court adjudged in the *Allgeyer case*, are embraced in the liberty which the Fourteenth Amendment protects against hostile state action, when such state action is wanting in due process of law. They are rights essential in the freedom conferred by the Thirteenth Amendment. If, for instance, a person is prevented, because of his race, from living and working where and for whom he will, or from earning his livelihood by any lawful calling that he may elect to pursue, then he is hindered in the exercise of rights and privileges secured to freemen by the Constitution of the United States. If secured by the Constitution of the United States, then, unquestionably, rights of that class are embraced by such legislation as that found in section 5508.

The opinion of the court, it may be observed, does not, in words, adjudge section 5508 to be unconstitutional. But if its scope and effect are not wholly misapprehended by me, the court does adjudge that Congress cannot make it an offense against the United States for individuals to combine or conspire to prevent, even by force, citizens of African descent, solely because of their race, from earning a living. Such is the import and practical effect of the present decision, although the court has heretofore unanimously held that the right to earn one's living in all legal ways, and to make lawful contracts in reference thereto, is a vital point of the freedom *established by the Constitution*, and although it has been held, time and again, that Congress may, by appropriate

legislation, grant, protect and enforce *any* right, derived from, secured or created by, or dependent upon that instrument. These general principles, it is to be regretted, are now modified, so as to deny to millions of citizen-laborers of African descent, deriving their freedom from the Nation, the right to appeal for National protection against lawless combinations of individuals who seek, by force, and solely because of the race of such laborers, to deprive them of the freedom established by the Constitution of the United States, so far as that freedom involves the right of such citizens, without discrimination against them because of their race, to earn a living in all lawful ways, and to dispose of their labor by contract. I cannot assent to an interpretation of the Constitution which denies National protection to vast numbers of our people in respect of rights derived by them from the Nation. The interpretation now placed on the Thirteenth Amendment is, I think, entirely too narrow and is hostile to the freedom established by the supreme law of the land. It goes far towards neutralizing many declarations made as to the object of the recent Amendments of the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom. *United States* v. *Reese*, 92 U. S. 214, 217; *United States* v. *Cruikshank*, 92 U. S. 542, 555; *Ex parte Virginia*, 100 U. S. 339, 345; *Strauder* v. *West Virginia*, 100 U. S. 303, 306; *Neal* v. *Delaware*, 103 U. S. 370, 386; *Civil Rights Cases*, 109 U. S. 3, 23.

The objections urged to the view taken by the court are not met by the suggestion that this court may revise the final judgment of the state court, if it should deny to the complaining party a right secured by the Federal Constitution; for the revisory power of this court would be of no avail to the complaining party if it be true, as seems now to be adjudged, that a conspiracy to deprive colored citizens, solely because of

their race, of the right to earn a living in a lawful way, infringes no right secured to them by the Federal Constitution.

As the Nation has destroyed both slavery and involuntary servitude everywhere within the jurisdiction of the United States and invested Congress with power, by appropriate legislation, to protect the freedom thus established against all the badges and incidents of slavery as it once existed; as the disability to make valid contracts for one's services was, as this court has said, an inseparable incident of the institution of slavery which the Thirteenth Amendment destroyed; and as a combination or conspiracy to prevent citizens of African descent, solely because of their race, from making and performing such contracts, is thus in hostility to the rights and privileges that inhere in the freedom established by that Amendment, I am of opinion that the case is within section 5508, and that the judgment should be affirmed.

For these reasons, I dissent from the opinion and judgment of the court.

NEW MEXICO *ex rel.* E. J. McLEAN & COMPANY *v.* DENVER & RIO GRANDE RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 18. Argued March 14, 15, 1906.—Decided October 15, 1906.

The right to legislate in the Territories being conferred under constitutional authority, by Congress, the passage of a territorial law is the exertion of an authority exercised under the United States, and the validity of such authority is involved where the right of the legislature to pass an act is challenged; and, in such a case, if any sum or value is in dispute, an appeal lies to this court from the Supreme Court of a Territory under § 2 of the act of March 3, 1885, 23 Stat. 443, even though the sum or value be less than $5,000.